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The Politics and Law of Anglo-American Antidiscrimination Regimes, 1945-1995

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The Politics and Law of Anglo-American Antidiscrimination Regimes, 1945-1995

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To my Mom and Reed,

and in memory of my Father

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The Politics and Law of Anglo-American Antidiscrimination Regimes, 1945-1995

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Since 1945, states have increasingly been called upon to use their power in order to enforce egalitarian norms. The Anglo-American countries have done so through the construction of antidiscrimination regimes. Given their common law foundations, this entailed a complex and politically fraught renegotiation of state-society relations. This dissertation provides an account of the origins and development of antidiscrimination regimes in the Anglo-American countries between 1945 and 1995 and it performs two main analytic tasks. First, it identifies and elaborates the component parts of antidiscrimination regimes, and second, it specifies the political processes through which those component parts change over time. I chart the development of an ideology of antidiscrimination, and through two case studies, I show the conditions under which political elites in Australia and New Zealand institutionalized its core tenets.

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Chapter One: Introduction

This dissertation provides an account of the origins and development of antidiscrimination regimes in the Anglo-American countries between 1945 and 1995, with special emphasis on Australia and New Zealand, and it performs two main analytic tasks. First, it identifies and elaborates the component parts of antidiscrimination regimes, and second, it specifies the political processes through which those component parts change over time. Beyond the American case, antidiscrimination regimes have remained an understudied area of political life as is evidenced by the dearth of literature within the comparative field. As I will show, however, these regimes constitute an important transnational and supranational trend, the study of which allows us to examine a number of important theoretical propositions concerning institutional creation and development. In any country, the creation of an antidiscrimination regime constitutes significant socio-legal reform and therefore deserves a special place in the comparative study of state development. As Richard Epstein notes, legal regimes are of fundamental importance, because they govern the ways in which "social life is ordered," and this is even more the case with antidiscrimination statutes because they are no ordinary laws.[1] They reconfigure the public-private divide, renegotiate citizenship rights, expand the state's coercive power, and legitimize the creation of new state institutions, while mobilizing new sets of political actors. Thus, in devising antidiscrimination regimes, political actors bring to the fore two key issues: the rights and duties of citizenship, and the role of the state in enforcing those rights and duties.

[1]Richard Epstein, *Forbidden Grounds: the case against employment discrimination laws* (Cambridge, Mass.: Harvard University Press, 1992), 3.

As I will show, Australia and New Zealand are particularly interesting cases because they were relatively late developers in comparison to other similarly situated states, namely Great Britain, Canada, and the United States, with regard to the development of antidiscrimination regimes. Furthermore, despite their close geographical proximity and the close ties that developed between their respective antidiscrimination policy communities, Australia and New Zealand nevertheless developed significantly different types of state capacities to enforce these laws. This not only presents us with an interesting empirical puzzle, it also provides us with a unique opportunity to examine the mechanics of institutional innovation and development.

Generally speaking, antidiscrimination regimes consist of laws that prohibit discrimination and the rules and institutions through which those laws are enforced. They constitute an important subject of inquiry for at least three main reasons. First is the political significance of these regimes. Since World War II, an elaborate body of international human rights instruments has recognized a state duty to eliminate discrimination.[2] States have been encouraged to establish domestic antidiscrimination regimes as a means of complying with those instruments, and as a result, the number of states with antidiscrimination laws on their books has multiplied.[3] Within different institutional settings, the process of enacting these laws generates various political dilemmas. The second and third reasons for studying antidiscrimination regimes speak to their theoretical import. The creation and development of these regimes are part of a broader process of democratization, and as such, they require greater explication and impose a more exacting theoretical standard. Antidiscrimination regimes also constitute a new substantive

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2 Robert Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada*, (Toronto: University of Toronto Press, 2000), 3.

3 This is discussed more fully in Chapter Three, infra.

field in which to examine complex theoretical propositions about the roles of ideas and institutions in political change.

THE POLITICAL SIGNIFICANCE OF ANTIDISCRIMINATION REGIMES

World War II served as an important "turning point,"[4] "a watershed, marking the beginning of a steady growth and consolidation of anti-discrimination policies,"[5] which was then followed by a "world revolution in minority rights."[6] A new international commitment to human rights was expressed in both the United Nations Charter[7] of 1945 and the Universal Declaration of Human Rights (UDHR)[8] of 1948. It was these early documents that laid the foundation for a postwar politics premised on the obligation of states to recognize and protect a broad range of citizen rights, not only against government itself but also against offending parties, including nongovernmental actors and institutions.[9] Subsequent international documents reinforced the primacy of a right to nondiscrimination, and they displayed a preference that states enforce this right through legal and administrative means.[10] Consider, for example, the International Convention on the Elimination of All

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4 Robert Brian Howe, "Human rights policy in Ontario: The tension between positive and negative state values" (Ph.D. Dissertation, University of Toronto, 1988), 65.

5 Rainer Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989), 36; and Martin MacEwen, *Anti-discrimination law enforcement: a comparative perspective* (Brookfield, Vt.: Avebury, 1997).

6 John D. Skrentny, *The Minority Rights Revolution* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2002), 347; Thomas F. Powers, "The Transformation of Liberalism, 1964-2001" *The Public Interest* (Fall, 2001), 59-81, 63; Frank Dobbin and Frank R. Sutton, "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions" 104 *The American Journal of Sociology* (Sep., 1998), 441-476; Charles R. Epp, *The Rights Revolution: lawyers, activists, and supreme courts in comparative perspective* (Chicago: University of Chicago Press, 1998).

7 June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

8 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

9 Alan Cairns and Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview" in Alan Cairns and Cynthia Williams (research coordinators), *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985), 1-50, 31; Martin MacEwen, *Tackling racism in Europe: an examination of anti-discrimination law in practice* (Washington, D.C.: Berg, 1995), 21; Asbjørn Eide, "The historical significance of the Universal Declaration" *UNESCO* (1998), 484-92.

10 Howe and Johnson, *Restraining Equality*, 3.

Forms of Racial Discrimination (ICERD),[11] the International Covenant on Civil and Political Rights (ICCPR),[12] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[13] all of which obligated states to protect individuals from discrimination in several areas of life. A right to nondiscrimination thus served as a cornerstone of the international human rights system after World War II, and today it continues as an integral component of both human rights and public international law.[14]

In addition to the state obligations created by international human rights instruments, the creation of antidiscrimination regimes is promoted around the world by a number of supranational organizations. Both the International Labour Organization (ILO) and the United Nations (UN) have long histories in this area.[15] Today, for example, the UN Center for Human Rights (UNCHR) in Geneva encourages states to construct domestic legal infrastructure for the protection of human rights. In October 1991, the UNCHR convened an international workshop to review and update information on existing national human rights institutions. Its participants—which included representatives of member states, UN agencies, intergovernmental and non-governmental organizations—drew up a comprehensive series of recommendations on the role, composition, status, and functions of national human rights institutions. They decreed that such institutions should be dedicated to protecting nationals against discrimination and other human rights violations.[16] Known

11 G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.
12 See Articles 3, 24, and 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
13 G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.
14 Peter Bailey, *Human Rights: Australian in an International Context* (Sydney: Butterworth's, 1990), 28-29; MacEwen, *Tackling racism in Europe*, 21.
15 John P. Humphrey, *Human rights & the United Nations: a great adventure* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984); Paul Gordon Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder, Col.: Westview Press, 1998), Chap. 8.
16 See Office of the High Commissioner for Human Rights, Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights, accessed on 21 July 2004 at http://www.unhchr.ch/html/menu6/2/fs19.htm.

as the Paris Principles, these recommendations were endorsed by the Commission on Human Rights in March 1992[17] and by the UN General Assembly in December 1993.[18]

Within Europe, several bodies promote antidiscrimination legislation as an appropriate means of regulating increasingly diverse societies. The U.S. Helsinki Commission, an independent federal agency created by Congress in 1976, monitors and encourages progress in implementing provisions of the Helsinki Accords.[19] It encourages East European countries, in particular, to adopt antidiscrimination legislation directed at protecting their Roma populations.[20] And, through the office of the High Commissioner on National Minorities, the Organization for Security and Cooperation in Europe (OSCE) also promotes the growth of antidiscrimination regimes.[21] Perhaps most dramatically, in 1999 the European Union (EU) amended the Treaty of Amsterdam to empower the European Commission to take appropriate action to combat discrimination based upon racial or ethnic origin, among other grounds. Thirteen months later, the European Council unanimously adopted a Racial Equality Directive that required the adoption of national legal protections against racial discrimination by July of 2003.[22] This Directive supplements an already strong EU commitment to addressing sex discrimination in employment.[23]

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17 See resolution 1992/54.

18 See resolution A/RES/48/134.

19 The Helsinki Commission, known formally as the U.S. Commission on Security and Cooperation in Europe, is a U.S. Government agency created by Public Law 94-304 with a mandate to monitor the activities of the OSCE and to encourage compliance with the Final Act of the Conference on Security and Cooperation in Europe, known as the Helsinki Accords, that was signed in Helsinki, Finland, on 1 August 1975, by the leaders of over thirty European countries, the U.S., Canada, and the U.S.S.R.

20 U.S. Newswire, "U.S. Helsinki Commission Co-Chairman Smith Praises Slovak Reforms, Urges Passage of Anti-Discrimination Law," 12 June 2002 accessed on 5 June 2003 at http://web5.infotrac.galegroup.com/itw/infomark/582/67/36552105w5/purl=rc1_EAIM_0_A87111341&dyn=7!xrn_5_0_A87111341?sw_aep=txshracd2598.

21 See the Organization for Security and Cooperation in Europe's Copenhagen Document on the Human Dimension. See also Rolf Ekeus, OSCE High Commissioner on National Minorities, "From the Copenhagen Criteria to the Copenhagen Summit: The Protection of National Minorities in Enlarging Europe" delivered to the conference on National Minorities in the Enlarged European Union, 5 November 2002.

22 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal (OJ) L 180/22, 19 July 2000.

The international human rights movement of the twentieth century was a reaction to atrocities committed both before and during World War II. The Nazi experience starkly demonstrated the powers of the state to perpetrate the worst sorts of crimes against humanity. Post-war activists drew two paradoxical lessons from that experience. First, state power should be circumscribed to prevent abuses of individual rights, and second, state power should be expanded to effect progressive, egalitarian social change. The resulting set of international human rights instruments and institutions are therefore best understood in terms of this duality of purpose. Although each dimension of reform raises distinctive analytic political and legal issues, scholars typically either ignore these differences or conflate them by examining human rights writ large. In the case studies that follow, I show how these two dimensions of reform generate specific political patterns and how they must, therefore, be examined with a discerning eye.

As traditionally conceived, human rights were thought to regulate only relations between individuals and voracious states. States were, accordingly, cast as the problem, and their containment was cast as the solution.[24] This conceptualization has framed much of the empirical work on international human rights, especially the focus on rights to freedom from torture, arbitrary arrest and execution and the rights to freedom of expression and assembly.[25] In contemporary parlance, these rights are usually called civil liberties, and they are codified in the main UN human rights conventions.[26] Because UN institutions lack any

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Interestingly, Britain's Commission on Racial Equality played an important role in the negotiations that produced the Racial Equality Directive. On this see Terri Givens and Rhonda Evans Case, "The Racial Equality Directive: Minority Rights Revolution or Politics as Usual" (Working Paper, Summer 2004).

23 Mark Bell, *Anti-discrimination law and the European Union* (Oxford: Oxford University Press, 2002), 8-9, 30.

24 Louis Henkin, *How nations behave: law and foreign policy*, 2nd ed. (New York: Columbia University Press, 1979), 2; Jack Donnelly, *International human rights*, 2nd ed. (International human rights, 1998), 403; Eide, "The historical significance of the Universal Declaration," 479; Dan Friedman and Daphne Barak-Erez, *Human rights in private law* (Portland, Or.: Hart Pub., 2001), 3.

25 Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

26 These are discussed infra, p. 3-4.

real authority to enforce state protection of civil liberties,[27] their enjoyment depends almost entirely upon the willingness of states to institutionalize legal infrastructures necessary for their protection, typically through a bill of rights. Such measures often prove politically contentious. After an aborted effort in 1960, New Zealand enacted a statutory bill of rights in 1990 that was intentionally designed to protect human rights without dramatically empowering the courts.[28] Australia, by contrast, has demonstrated a longstanding antipathy to such measures and has rejected proposals to create a statutory bill of rights, as well as other proposals that would amend its constitution.[29]

As Jack Donnelly suggests, however, constraining states is only part of the story, for a benign state may govern a society in which private actors routinely violate individuals' human rights. Therefore,

> [t]he human rights functions of the State must also include protecting individuals against abuses of power by other individuals and private groups. The State, although needing to be tamed, is in the contemporary world the principal institution we rely on to tame social forces no less dangerous to the enjoyment of human rights."[30]

According to this logic, the task is "to transform the State from a predator into a protector of rights."[31] In pursuit of that aim, international human rights instruments not only prescribe "negative obligations" that require states to refrain from abusing citizens, they also prescribe positive obligations intended to rectify power imbalances between various social groups.[32] This requires an activist state, perhaps more active than some find politically

27 Donnelly, *International Human Rights*, 206-13; David Forsythe, *The internationalization of human rights* (Lexington, Mass.: Lexington Books, 1991), 60-70, 2000: 57-79.

28 The success of their design in that regard is debatable, see Paul Rishworth, et al., *The New Zealand Bill of Rights* (New York: Oxford University Press, 2003).

29 Bailey, *Human Rights: Australia in an International Context*, 45-78; George Williams, *Human rights under the Australian Constitution* (New York: Oxford University Press, 1999), 33-45, 250-60.

30 Jack Donnelly, *International Human Rights*, 403; see also Walter S. Tarnopolsky and William Pentney, *Discrimination and the Law in Canada* (Toronto: R. De Boo, 1982), 25.

31 Donnelly, *International Human Rights*, 402; Eide, "The historical significance of the Universal Declaration," 487.

32 Elizabeth Heger Boyle and John W. Meyer, "Modern Law as a Secularized and Global Model: Implications for the Sociology of Law" in Yves Dezalay and Bryant G. (eds.), *The internationalization of palace wars: lawyers, economists, and the contest to transform Latin American states* (Chicago: University of Chicago Press, 2002); David

acceptable, and it requires an expansion, or at least a renegotiation, of the scope of state authority vis-à-vis society.

In order to meet these international human rights prescriptions, states must often enact legislation that establishes, or rearranges, rights and obligations between private individuals and thus alters the public-private divide.[33] This essentially requires using the state to democratize society,[34] an endeavor that may chaff against concomitant commitments to a limited state. It also entails divesting some individuals of their preexisting prerogatives and powers, which may also generate opposition.[35] For these reasons, determining the scope of the state's authority vis-à-vis society to enforce a right to nondiscrimination poses an inherently controversial political problem.[36] Indeed, in Epstein's estimation, such matters demonstrate that the "separation between private law and the grander questions of constitutional law and public regulation" is difficult, if not impossible, to maintain.[37]

A large body of scholarship suggests that in providing for human rights protections states may thereby extend their power over society. For example, according to Ramm, "the fight against social discrimination requires, nearly always, state intervention."[38] Critics of antidiscrimination laws often seize upon this fact. Ray Honeyford, a critic of Britain's antidiscrimination regime, suggests that such laws embody "the notion that the state knows

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Jacobson, *Immigration and the decline of citizenship* (Baltimore : Johns Hopkins University Press, 1996); Eide, "The historical significance of the Universal Declaration," 487.

33 Williams, *Human rights under the Australian Constitution*, 11.

34 See Epstein, *Forbidden Grounds*, 91-94; Andrew Koppelman, *Antidiscrimination law & social equality* (New Haven: Yale University Press, 1996), 4; Powers, "The Transformation of Liberalism," 59-81, 74.

35 Kairys 2001: 1880.

36 Eide, "The historical significance of the Universal Declaration," 487.

37 Epstein, *Forbidden Grounds*, xi.

38 Ramm 1978: 22; Kristin Bumiller, *The Civil Rights Society: the social construction of victims* (Baltimore: Johns Hopkins University Press, 1988), 15; Koppelman, *Antidiscrimination law & social equality*; James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 1997), 321.

best about an issue which, in the past, has always been settled in societal terms."[39] This, in his opinion, distorts the "established and settled ways of settling matters connected with rights in relation to the acceptance and integration of newcomers and their descendants." The state serves as the principal enforcer of democratic rights. But, the precise rights that it enforces and the mode of enforcement have changed in important ways.

That human rights are often understood as presenting a challenge to the scope and authority of the state creates a puzzle: does expanding human rights in reality enlarge or limit state power? My findings confirm that human rights expand state power, but I refine our understanding of this expansion's significance. Better understanding the thrust of human rights enables us to see that democratization can involve shifting authority from society to the state as well as from state to society. For society, it involves constructing new rights and for the state it entails developing enforcement mechanisms.

THE POLITICAL DYNAMICS OF ANTIDISCRIMINATION REGIMES

Antidiscrimination regimes consist of laws that prohibit discrimination on specified grounds in specified areas of life, as well as the rules and institutions that govern enforcement of those laws and protections. They call upon states to exercise both constitutive and coercive powers. As employed here, a regime consists of a complex of rules, norms, principles and procedures that regulate state activities,[40] and as such, it institutionalizes core assumptions in a specific issue area. Once established, a regime "governs the meanings actors give to events occurring both within the structure of institutions and of political discourse."[41]

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39 Ray Honeyford, *The Commission for Racial Equality: British bureaucracy and the multiethnic society* (New Brunswick, N.J.: Transaction, 1998), 5.

40 Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, N.J.: Princeton University Press, 2004), 150.

41 Alexander 2000: 61.

The scope of antidiscrimination regime can be assessed along two dimensions: 1) the grounds upon which discrimination is prohibited, and 2) the areas of life to which that prohibition extends. It is along these dimensions that we may speak of regime expansion and contraction. The first antidiscrimination laws generally protected against racial discrimination. Today, however, the list of protected grounds has grown dramatically. The addition of new protected grounds has often proven contentious, especially where discriminatory attitudes and practices link up with religious faith, as at present in the case of homosexuality. Often, such additions challenge fundamental assumptions held by a society about the core social arrangements that maintain social stability. Symbolically, antidiscrimination laws convey social meaning about who belongs to a community and upon what terms. They codify norms of behavior, declare particular rights and freedoms to be "fundamental to the conduct of society," and pronounce certain actions and forms of behavior to be socially unacceptable.[42] Debates over protected grounds, therefore, are often the frontlines in broader conflicts about citizenship.

In addition to identifying protected grounds, antidiscrimination regime architects must also decide whether the law will apply to the state, to non-state actors, or both. These decisions are controversial and consequential. Political elites in Australia and New Zealand have usually been reluctant to bind the state under such laws because they do not want to constrain state action, and they do not want to empower the courts further. In contrast to the U.S., Australia and New Zealand lack a tradition of constitutional rights that are enforceable against the state.[43] Individuals aggrieved by state actions have generally been limited to seeking relief through traditional common law writs. Australian and New Zealand

42 Chris Ronalds, *Affirmative action and sex discrimination: a handbook on legal rights for women* (Sydney: Pluto Press, 1987), 10-12.

43 In 1990, however, New Zealand adopted a statutory Bill of Rights (see Chapter 4, infra), but it was deliberately designed to prevent the courts from exercising American-style judicial review. Australia, by contrast, has repeatedly rejected amending its Constitution to provide protection for rights and liberties.

have courts customarily evaluated whether executive actions are *ultra vires* or whether they constitute a denial of natural justice,[44] but they could not declare acts of parliament inoperative.

By binding the state, antidiscrimination statutes opened the possibility in Australia and New Zealand of new challenges against the executive government. The relationship of those statutes to other acts of parliament proved to be more problematic, however. Because antidiscrimination laws codify fundamental values, some political actors have argued that they possess a "quasi-constitutional" status, and therefore other laws that abridge the protections they afford should be unenforceable by the courts. In the late 1990s, these complex issues confounded members of the New Zealand Parliament, and they found themselves engaged in a protracted debate over the appropriate relationship between the Human Rights Act of 1993 and the Bill of Rights adopted in 1990. Facing such quandaries, courts in Australia and New Zealand have borrowed heavily from the jurisprudence of other Anglo-American countries, Canada in particular, in order to elevate the status of antidiscrimination laws and justify liberal interpretations thereof.

Political elites in Australia and New Zealand have also had to determine the outer boundaries of the state's authority vis-à-vis society. Like other areas of regulation, such as those involving financial institutions and the environment, antidiscrimination regimes grapple with issues about these boundaries. This raises nettlesome questions of philosophical importance. Should small businesses and "private" clubs be prohibited from discriminating? Should antidiscrimination laws apply to the operation of religious organizations? And should they apply to individuals who take on boarders in their homes? Tricky political questions are also raised. For example, the Labor Party in Australia and the Labour Party in New Zealand have historically been closely tied to trade unions, many of

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[44] Benjafield and Whitmore 1971; Hotop 1985: 168-246; McMillan and Williams 1998.

which were racially and sexually discriminatory and opposed to the enactment of antidiscrimination laws. As I will show, the two parties had great difficulty in determining whether unions should be included within the antidiscrimination regime's scope.

Once issues of regime scope are decided, political elites must determine the means by which antidiscrimination laws are to be enforced. In devising the rules and institutions that govern the laws' enforcement, elites have confronted a number of subsidiary but significant matters. Over time, as I will show, antidiscrimination enforcement has changed in important ways. In devising an enforcement scheme, elites first must determine whether the law will be criminal or civil in nature, or both. Early statutes in the U.S. and Canada, for example, criminalized specific acts of discrimination,[45] and France's antidiscrimination regime still employs a criminal approach.[46] Elites must decide, further, whether to create a special agency dedicated to enforcing these laws. Without such an agency, enforcement is left to preexisting institutions apathetic, if not hostile, towards efforts to end discrimination. Australia and New Zealand have primarily relied upon civil laws, and both have created special enforcement agencies, with varying sets of powers.[47]

Once decisions to establish enforcement agencies have been made, a number of corollary decisions follow: How will these agencies be staffed? What will be their linkages to other agencies and institutions? And, what powers will they be accorded? Enforcement agencies are generally charged with some combination of educational and coercive powers. They may be granted broad regulatory powers, such as responsibility for designing, monitoring, and enforcing affirmative action plans. They may be empowered to conduct inquiries, as is the case with the Commission on Racial Equality and Equal Opportunities

45 Milton R. Konvitz, *A century of civil rights* (New York: Columbia University Press, 1961); Tarnopolsky and Pentney, *Discrimination and the Law in Canada*.

46 See Erik Bleich, *Race politics in Britain and France: ideas and policymaking since the 1960's* (New York : Cambridge University Press, 2003), Chaps. 6-7.

47 Both Australia and New Zealand do, however, have laws that criminalize the incitement to racial hatred and racial violence. Those laws are not included within the scope of this study.

Commissions in Britain. Most often, they are empowered to receive and conciliate individual complaints, as is the case in both Australia and New Zealand. Elites must also decide the agency's role in cases in which conciliation fails. Should there be a right of appeal, for example, and if so, what institution should be charged with hearing it? New Zealand has a special administrative tribunal, now known as the Human Rights Review Tribunal. A 1995 decision by the Australian High Court, however, foreclosed that option there;[48] unconciliated complaints, instead, go directly into Australia's federal court system.

Supporters of antidiscrimination regimes also often demand that administrative tribunals and courts be comprised of individuals possessing expert knowledge of antidiscrimination law. Because they typically consider the enforcement of antidiscrimination law to be in the public's interest, as opposed to simply serving the interests of individual complainants, antidiscrimination enthusiasts also seek to have the state provide legal representation for complainants. This can be accomplished through generous legal aid schemes or by empowering enforcement agencies to represent complainants. Australian and New Zealand's antidiscrimination regimes differ on this key point. New Zealand has a Director of Human Rights Proceedings, functionally independent of its Human Rights Commission, who may choose to represent individual complainants if he or she deems the litigation to be of strategic importance to the jurisprudential development of the law. Australia, by contrast, has resisted assigning the state such an activist role; its Human Rights and Equal Opportunity Commission (HREOC) is empowered only to intervene in antidiscrimination litigation, a power that it has used sparingly. Even so, a recent attempt by the politically conservative government of Prime Minister John Howard to require the HREOC to obtain the Attorney-General's permission before exercising that power was thwarted only after a public outcry from civil society organizations. Finally, the

48 See *Brandy v. Human Rights and Equal Opportunities Commission* (1995) 127 ALR 1.

rules and institutions that govern enforcement can rely upon the state's enforcement capacity or they can incentivize private enforcement, thereby spurring new forms of political action in the name of social reform. Private enforcement can be encouraged by laws that provide for large damages awards and that authorize class actions. These have been highly controversial matters in Australia and New Zealand.

The political forces that shape the politics of antidiscrimination regime formation and development include ideology, elites, and institutions. These forces undergo important changes over time that affect the trajectory of regime development. My analysis, therefore, will distinguish between the point of regime formation and the subsequent period of regime development. This periodization enables me to demonstrate the "feedback effects" that a regime may generate and the ways in which they affect its scope, its enforcement scheme, and the status assigned to antidiscrimination laws.[49] New Zealand's antidiscrimination regime was created in 1971 with the passage of the Race Relations Act, and Australia's was created four years later with the passage of the Racial Discrimination Act.[50]

Between the 1940s and 1970s, three important currents of intellectual thought emerged across the Anglo-American world and laid the ideological foundation for the construction of antidiscrimination regimes. First, scientific views that conceived of race and gender in terms of inherent biological differences were supplanted by a social constructivist conception of human differences.[51] According to the latter view, human behavior was a product of environmental stimuli; it followed that by reengineering those stimuli, human behavior could be shaped and controlled. Second, a number of sociologists and social

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49 Paul Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change" 45 *World Politics* (Jul., 1993), 595-628; and Pierson, *Politics in Time*.

50 The first law against discrimination, targeting racial discrimination, was enacted by the State of South Australia in 1966. No such other laws were enacted until the federal law in 1975.

51 See Gunnar Myrdal, *An American Dilemma: the Negro problem and modern democracy* (New York: Harper & Brothers, 1944); Knopff, *The New War on Discrimination*.

psychologists concluded that law could, in fact, serve as an effective tool in that reengineering effort.[52] It had previously been thought that social change could not be accomplished through the coercive force of law; rather, social change could only be accomplished through educational efforts undertaken within civil society.[53] Third, as a normative matter, democracy was accorded a more substantive definition. It not only required that government be subject to popular control, but it now required that society operate according to egalitarian norms. In sum, these three currents of thought were used to support a more activist state role in terms of regulating society in accordance with egalitarian norms. I refer to them collectively as the ideology of antidiscrimination.

Although the ideology of antidiscrimination was ascendant between the 1940s and 1970s, it was not without challengers. By the 1980s, a counter-ideology of free markets[54] and socially conservative values was increasingly articulated by economists, other social scientists, and religious groups. This was more accepting of social hierarchy and viewed antidiscrimination laws as coercive measures that inhibit rather than protect individual liberty. Furthermore, exponents of this counter-ideology sought generally to scale back the scope of the state in favor of society-driven patterns of social ordering. As I will show, this counter-ideology exercised less influence on New Zealand's antidiscrimination regime than on Australia's. By 1977, New Zealand had already constructed an expansive regime, whereas Australia had taken only limited steps during the 1970s. The effort to expand Australia's regime to include women and to create new enforcement agencies coincided with a

52 Gordon W. Allport, ed., *Controlling Group Prejudice* (Philadelphia, 1946), and Gordon Allport, *The Nature of Prejudice* (Reading, Mass., Addison-Wesley Pub. Co., 1954).
53 William Graham Sumner, *Folkways: a study of sociological importance of usages, manners, customs, mores, and morals* (Boston: Ginn, 1906).
54 See Milton Friedman, *Free to choose: a personal statement* (New York: Harcourt Brace Jovanovich, 1980).

rightward turn in the thinking of the traditionally conservative Liberal Party, as well as in that of the Australian Labor Party.[55]

As Thomas Risse-Kappen has observed, "ideas do not float freely"; but rather, to have effects they require agents of dissemination.[56] Thus, one cannot take ideas seriously without also taking seriously the role of political elites.[57] Three different sets of political elites appear to be especially important in adopting a particular ideology and in advocating particular policies: civil society actors, bureaucrats, and politicians. A wide range of civil society actors may advocate antidiscrimination laws. They include individuals seeking legal protection based upon a particular characteristic they share, such as race or sex; progressive religious or secular organizations; academics, especially lawyers and law professors. Government bureaucrats situated in foreign affairs departments may also press for antidiscrimination laws in response to international human rights developments. So, too, may bureaucrats in departments dedicated to minority interests or in departments of justice, for they may perceive such laws as expanding their bureaucratic interests. Finally, politicians may detect an electoral advantage in advocating antidiscrimination laws. Such advocacy may, for example, allow one party to distinguish itself from another as more progressive party, or it may allow a party perceived as too conservative to portray itself in a more favorable light. The identities of the political elites who act in support of antidiscrimination, therefore, can be expected to change over time, and over time those elites confront changed policymaking contexts.

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55 Ken Coghill, ed., *The New Right's Australian Fantasy* (Ringwood, Vic: Penguin Books, 1987).

56 Thomas Risse-Kappen, "Ideas do not float freely: transnational coalitions, domestic structures, and the end of the cold war," 48 *International Organization* (Spring, 1994).

57 John Higley, Desley Deacon and Don Smart. *Elites in Australia* (Boston: Routledge & K. Paul, 1979); Michael G. Burton and John Higley, *Elite Settlements* (Austin: Institute of Latin American Studies, University of Texas at Austin, 1987).

In working to institutionalize a commitment to antidiscrimination, civil society, bureaucratic, and political elites must work within given institutional contexts that involve both opportunities and constraints. When enacting national antidiscrimination legislation, Australian elites—whose constitution-making forebears borrowed heavily from the American model—faced a fundamental constitutional quandary. The Australian Constitution accords the federal (also known as the Commonwealth) government a limited list of specified powers, and authority to enact antidiscrimination legislation is not clearly among them. Accordingly, in 1975, international human rights obligations were used to justify the enactment of the Racial Discrimination Act under the Commonwealth's constitutional authority over "external affairs."[58] The High Court affirmed that controversial move seven years later.[59] In addition, Australia, like the U.S., has a bicameral parliament, with a powerful Senate. Since 1949, the Senate has been elected by a proportional representation, and, as a result, governments formed by commanding a majority in the House of Representatives have rarely commanded a simultaneous majority in the Senate. As I will show, Australian Senates hostile to governments of the day have played a pivotal role in shaping the country's antidiscrimination regime. Because New Zealand lacks a written constitution and because its upper chamber was abolished in 1950, its elites have faced no such obstacle.

The creation of an antidiscrimination regime may have three main effects on a political system. First, it may generate political mobilizations among new actors who see inclusion within the regime as a measure of "full citizenship" in the polity and who therefore demand the extension of the regime's protections to their own and additional groups. Further, as new civil society actors study or make use of antidiscrimination laws, they may

58 Australian Constitution, § 51 (xxix).
59 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. This decision was reaffirmed in *Commonwealth v Tasmania* (Tasmanian Dams Case) (1983) 158 CLR 1.

become advocates for further reforms. Law professors and practicing attorneys who specialize in antidiscrimination law are sound examples. The development of new supranational human rights instruments may necessitate the addition, or at least consideration, of new protected grounds. Second, scholars who examine rights-based minority politics suggest that "institutional homes" can affect a political system in several ways,[60] and agencies charged with enforcing antidiscrimination laws can serve as such institutional homes. Among other things, they may constitute as a focal point for civil society demands and, as such, push for an expansion in the law's scope. Further, enforcement agencies can provide resources and positions of influence from which a new group of supportive elites can justify the expansion and strengthening of their own political power. The third broad effect of antidiscrimination regimes on political systems involves their linkages with parliament and the courts, because they may enable emerging elites to play an important role in agenda-setting and developing the law through the courts. As I will show, the actual effects of enforcement institutions vary depending upon the skill sets and ambitions of the individuals that inhabit them.

It can be seen, therefore, that antidiscrimination enforcement agencies are embedded within broader ideological and institutional settings, and they often rely upon the actions of political elites. In particular, these agencies depend upon the government of the day to provide financial resources and appoint agency leaders, and governments frequently use their budgetary powers to constrain the agencies.

60 Chris Bonastia, "Why Did Affirmative Action in Housing Fail during the Nixon Era? Exploring the "Institutional Homes' of Social Policies," 47 *Social Problems* (2000), 523-42; Epp, *Lawyers, activists, and supreme courts in comparative perspective*; Knopff, *The New War on Discrimination*, 86; F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Orchard Park, N.Y.: Broadview Press, 2000), 114-125; Skrentny, *The Minority Rights Revolution*, 8.

ANTIDISCRIMINATION REGIMES AND POLITICAL SCIENCE

Proponents of antidiscrimination regimes often portray their development as the product of inevitable,[61] organic, or evolutionary processes[62] that mark "a milestone in the evolution of democracy."[63] According to this teleological account, antidiscrimination regimes are part of a continuous sequence of events beginning with the Magna Carta in 1215 and culminating in the latest proposal for human rights reform.[64] Unfortunately, this account hinders our understanding of the politics of human rights and antidiscrimination regimes in at least three ways. First, it denies that a transformation in the substance and scope of rights has occurred over the years, thus ignoring the fact that some rights may have been lost or circumscribed to accommodate the creation of new rights. Second, it summarily dismisses any opposition to antidiscrimination laws as immoral and reactionary, thereby denying that opposition may be grounded in a preference for other worthy values, such as limited government and classical liberal freedoms. And third, the teleological account attributes considerable causal power to ideas, but fails to specify exactly how and why particular rights or ideas come to exert such power. By obscuring the dynamics of the political contestation that produces reforms, the significance of reform achievements is, itself, obscured. While a teleological account helps to legitimize antidiscrimination laws by

61 See remarks of New Zealand Minister of Justice, 411 *NZPD* 1474.

62 For example, a discussion paper produced by the New Zealand government in 2000 maintained that the country's human rights law and institutions had "grown organically, largely in response to the adoption of the international standards we have helped to develop" (Discussion Paper 2000: 6). Similarly, a discussion paper produced by the Canadian government in 2004 described the development of its antidiscrimination protections in terms of an "evolutionary process" (*Promoting Equality: A New Vision*, Chapter 3 last accessed on 6 May 2004 at http://canada.justice.gc.ca/chra/en/frp-c3.html).

63 See the comments of Australian Senator Arthur Gietzelt during his second reading speech on the Commonwealth Race Discrimination Bill 1975, Senate, *Hansard*, 15 May 1975, 1528.

64 Alice Ehr-Soon Tay, *Human rights for Australia: a survey of literature and developments, and a select and annotated bibliography of recent literature in Australia and abroad* (Canberra: Australian Government Publishing Service, 1986), 7-8. New Zealand M.P. Graeme Reeves suggested that the Human Rights Bill 1993 was "a further step" in the "evolution" of human rights, 537 *NZPD* 16912.

making them appear natural and inevitable, it does not accurately reflect the political development of those laws and their enforcement mechanisms.

Political scientists are well poised to challenge this account and pinpoint the political processes that actually drive antidiscrimination regime formation and development. While various monographic studies of the U.S.,[65] Canada,[66] and Great Britain[67] have been made, few scholars have engaged in a systematic and comparative analysis.[68] Moreover, those studies that do exist typically pay too little attention to the ideological differences that have separated regime proponents from opponents. In this section, I discuss the recent and relevant political science scholarship on ideas, elites, and institutions, scholarship that offers theoretical and conceptual tools to frame just such an analysis.

These tools derive mainly from the historical institutionalist approach,[69] a body of research that emphasizes the interactive role of ideas and institutions in political change.[70] Historical institutionalists, for example, pay close attention to changes in the role of the state vis-à-vis society, focusing on the demands that drive those changes as well as the ways in which changes reshape social and political interests and subsequent demands upon the

65 Charles Whalen and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Washington, D.C. : Seven Locks Press,1985); Hugh Davis Graham, *The Civil Rights Era* (New York: Oxford University Press, 1990).

66 Herbert A. Sohn, "Human Rights Legislation in Ontario" (DSW, Thesis, Toronto: University of Toronto, 1975); Howe, "Human Rights Policy in Ontario"; Morton and Knopff, *The Charter Revolution and the Court Party*.

67Anthony Lester and Geoffrey Bindman, *Race and Law in Great Britain*, Cambridge, Mass.: Harvard University Press, 1972.

68 Cf. Freeman, *Immigrant labor and racial conflict in industrial societies: the French and British experience, 1945-1975* (Princeton, N.J.: Princeton University Press, 1979); and Bleich, *Race Politics in Britain and France*, both of whom compared Great Britain and France.

69 Sven Steinmo, Kathleen Thelen, and Frank Longstreth, eds., *Historical institutionalism in comparative analysis* (New York: Cambridge University Press, 1992); Mark Blyth, *Great transformations: economic ideas and institutional change in the twentieth century* (New York: Cambridge University Press, 2002); Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (New York: Cambridge University Press, 2004).

70 One might also include here work commonly referred to as American Political Development, see Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004); Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, NJ: Princeton University Press, 1987); Gretchen Ritter, *Goldbugs and Greenbacks: the antimonopoly tradition and the politics of finance in America* (New York: Cambridge University Press, 1997).

state.[71] Substantively, much of historical institutionalist scholarship examines economic and welfare policies, and as such situates itself within the terrain of political economy.[72] By contrast, this dissertation suggests that the intersection of law and politics is another important locus for the application of historical institutionalist analysis.

Institutional analysis does not attempt to show that ideas are all that matter but rather to show how they matter.[73] Ideas, Robert C. Lieberman suggests,

> constitute much of the substantive raw material upon which institutional theory feeds—the goals and desires that people bring to the political world and, hence, the ways they define and express their interests; the meanings, interpretation, and judgments they attach to events and conditions; and their beliefs about cause-and-effect relationships in the political world and, hence, their expectations about how others will respond to their own behavior.[74]

Successful institutionalization of a set of ideas depends upon their dissemination. Randall Hansen and Desmond King suggest that political actors who operate as "carriers" of ideas perform two essential functions. First, they proselytize in favor of new ideas, providing them with an audience and helping to bring them into prominence; second, they channel prominent ideas into the policy process.[75] Hansen and King argue that the "specific content of the interest is less important than the actor's perception that particular ideational frameworks further these interests."[76] They contend, further, that ideas are more likely to be translated into policy when actors believe that promoting particular ideas will advance their interests, when they possess the "requisite enthusiasm and institutional position," and when "timing contributes to a broad constellation of preferences that reinforce, rather than detract

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71 Pierson, *Politics in Time.*

72 *Thelen, How Institutions Evolve.*

73 See Sherri Berman, "Ideas, Norms, and Culture in Political Analysis" 33 *Comparative Politics*: 231-50 2001; Blyth, Great Transformation; Martha Finnemore, *National interests in international society* (Ithaca, N.Y.: Cornell University Press, 1996); Margaret E. Keck and Kathryn Sikkink, *Activists beyond borders: advocacy networks in international politics* (Ithaca, N.Y. : Cornell University Press ,1998).

74 Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," 96 *American Political Science Review* (2002):697-712, 697.

75 Lieberman, "Ideas, Institutions, and Political Order," 258.

76 Lieberman, "Ideas, Institutions, and Political Order," 256.

from, these ideas."[77] Ideas may serve an actor's interests in three ways: first, by simply providing "cover" for what he or she wants to do anyway; second, by enhancing a politician's profile and reputation; and third, by facilitating coalition building.[78] Hansen and King make clear that institutional context and timing matter greatly. Other scholars agree that explaining choices among competing ideas requires knowledge about institutional power and resources available to advocates in policy debates.[79] Rather than maintaining that specific actors will always be central to policymaking, institutionalists survey the prevailing political landscape to understand how, and to whom, "power is parceled out."[80]

According to Lieberman, "[p]art of understanding political development and institutional change is understanding which ideas win (or, in fact, which ideas are in the arena to begin with), why and with what consequences for whom."[81] Further, one must recognize that such ideas may emanate from international or domestic sources, or both. Temporally, therefore, we might expect the ideational origins of antidiscrimination regimes to differ from the ideas that drive their subsequent development. Paul Pierson encourages scholars to incorporate the temporal dimension into their analyses.[82] Following Pierson, I contend that it is precisely through antidiscrimination statutes that political actors manipulate legal rules and institutions in order to create and maintain new socio-legal frameworks within which social conflict and change occur,[83] and it is the legal system that plays a primary role in

77 Lieberman, "Ideas, Institutions, and Political Order," 262.
78 Lieberman, "Ideas, Institutions, and Political Order," 259
79 Peter A. Gourevitch, *Politics in hard times: comparative responses to international economic crises* (Ithaca: Cornell University Press, 1986), 54.
80 Bleich, *Race Politics in Britain and France*, 23; Peter A. Hall, *Governing the economy: the politics of state intervention in Britain and France* (Cambridge: Polity, 1986), 264; Desmond King, *In the name of liberalism illiberal social policy in the USA and Britain* (New York: Oxford University Press, 1999), 2.
81Lieberman, "Ideas, Institutions, and Political Order," 260.
82 Pierson, *Politics in Time.*
83 Frank K. Upham, *Law and social change in postwar Japan* (Cambridge, Mass. : Harvard University Press, 1987), 3-4.

determining which forums are available to disputants and what forms of conflict are appropriate.

RESEARCH DESIGN

My study examines the emergence of an antidiscrimination ideology and the formation and development of antidiscrimination regimes in Anglo-American countries. These countries are of particular interest because their development is frequently explained in terms of a teleological narrative, and scholars often take for granted the pre-existence of a "civil rights template" without questioning its origins. Thomas Burke, for example, suggests that the Anglo-American countries could easily include disability as a protected ground within their civil rights tradition because they did not have to develop "a new way of thinking about equality."[84] As other scholars have shown, however, civil rights traditions are themselves political constructions,[85] and we need a better understanding of the process through which they were constructed.[86]

In this dissertation, I trace the development of an ideology of antidiscrimination and show the patterns of its institutionalization in the Anglo-American countries between 1945 and 1995. The specific processes through which institutionalization occurs are examined in case studies of two countries, Australia and New Zealand. The comparative, case study approach has been recommended by a number of scholars.[87] Australia and New Zealand were selected because they raise interesting empirical questions, and because they have

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84 2000: 5.

85 Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004).

86 Powers, "The Transformation of Liberalism."

87 Donnelly, *International Human Rights*, 267-68; Jacobson, *Immigration and the Decline of Citizenship*, 2-3; Anne Gallagher, Making human rights treaty obligations a reality: Working with new actors and partners," in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 201-28, 201.

received far less attention within the literature than the U.S., Canada, and Great Britain. Each case study focuses primarily on the national antidiscrimination regime. Australia has a federal political system. Developments at the state and territorial levels are considered only to the extent that they influenced national development. New Zealand, by contrast, is a unitary state. My analysis also incorporates developments in international human rights.

Employing qualitative techniques, such as process tracing and content analysis, I identify the individuals and groups who sought to influence the decisions to enact and expand antidiscrimination legislation. By examining their arguments, I identify their preferences and trace the extent to which they were able or unable to get their preferences realized. Tracing regime development over such a long period of time requires the evaluation of a broad range of materials, including both primary and secondary sources. I examine discussions of discrimination in parliamentary debates and the production of government documents, and I marshal data from archives, personal interviews, and secondary accounts. In some instances, especially fir the early period of regime development, copies of the legislative bills were not available. Nevertheless, the contents of those bills could be reconstructed through analysis of parliamentary debates, committee hearings, and secondary sources. Lists of individuals and organizational representatives attending committee hearings or filing submissions were obtained. Participant interviews illuminated details not captured by other accounts, describing events and relationships between developments that were sometimes not visible to outside observers. Reliance upon multiple sources of evidence facilitates the identification of converging information.[88]

88 Robert K. Yin, *Case Study Research: Design and Methods* (Newbury Park, CA: Sage Publications, 1994).

ROADMAP TO SUBSEQUENT CHAPTERS

Chapter Two sets forth the logic of the common law regime that preceded the adoption of antidiscrimination regimes. Chapter Three provides a historical overview of the emergence and development of the antidiscrimination ideology at both national and international levels, paying close attention to developments in the U.S., Canada, and Great Britain. Chapters Four and Five examine the formation and development of antidiscrimination regimes in Australia and New Zealand. Finally, in Chapter Six, I assess the implications of these regimes for liberal democratic governance.

Chapter Two: The Common Law

> The common law, marvelous as it has been in developing safeguards for human rights in certain fields, never succeeded in tackling the problem of the alien, never succeeded in tackling the problem of the woman and never succeeded in tackling the problem of religious minorities and it has in our day had to be supplemented by detailed legislation to ensure a measure of justice to racial groups.
>
> ~ Lord Scarman (1978)

The common law originated in the local courts of ancient England and was later transplanted in Australia, Canada, New Zealand, and the U.S. by British colonists.[89] Its rules are not found in codes written by a single authority, but rather they derive from a body of decisions made over time by judges who were expected to issue rulings that followed principles established in previous, similar cases. The common law governs torts—civil wrongs that result in personal injury or property damage—as well as contracts, property, and other areas of private life. In the nineteenth and early twentieth centuries, the common law was generally viewed as a "neutral, pre-political ordering of society" that "provided the natural ordering for relations among private parties."[90] Before the relatively recent explosion in statutory law, which codified some common law rules and supplanted others with new rules, the common law provided the terms upon which social relations were governed. As I show in this chapter, by privileging classical liberal values of property and contract,[91] courts generally interpreted the common law as recognizing a right to discriminate, and they thereby accorded non-state actors and institutions important community-defining powers.

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89 See Arthur R. Hogue, *Origins of the Common Law* (Bloomington: Indiana University Press, 1966); and George W. Keeton, *The Norman Conquest and the Common Law* (New York: Barnes and Noble, 1966). On the common law generally, see Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown, 1923); S.J., Stoljar, *A history of contract at common law* (Canberra: Australian National University, 1975); Joel Prentiss Bishop, *Commentaries on the law of married women under the statutes of the several states, and at common law and in equity* (Boston: Little, Brown, and Company, 1873); Bayefsky 1985: 328.

90 "Note: The Antidiscrimination Principle in the Common Law," 102 *Harvard Law Review* 1989: 2010.

91 Cf. Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991).

As Lord Scarman suggests, judges did not see the problem of discrimination experienced by aliens, women, religious minorities, or racial groups.

Those who controlled property and capital were able, if they so chose, to wield their common law rights for the purpose of excluding certain individuals—typically on grounds of race or religion—from public accommodations, employment, and housing. No state law or regulation prescribed such exclusion; rather, it was accomplished by individuals and groups acting upon personal prejudices or assessments of community, or market, preferences. The state, however, could become involved in enforcing private exclusionary practices if those practices were challenged in the courts. Judges could, for example, enforce a restrictive covenant that prohibited the sale of property to a racial or religious minority. Throughout the nineteenth and early twentieth centuries, courts often protected the right to discriminate at the expense of those who challenged that right in the name of equal access. Even in those cases where judges found for plaintiffs alleging discrimination, they were only willing to award what amounted to nominal damages that failed to redress the personal humiliation that was suffered. Cumulatively, the exclusionary practices of private actors defined the community and one's membership in it through the physical separation of the different groups, which had the corollary effect of stigmatizing some groups as second-class citizens by denying them equal respect and treatment.

The common law did not recognize discrimination as a cause of action,[92] but in the absence of statutory or constitutional provisions prohibiting discrimination by non-state actors, a challenge under the common law was an aggrieved individual's only mode of legal redress. Such individuals had to craft a cognizable common law claim, typically in tort or for breach of contract. In some cases, judges disposed of the legal issues without so much as discussing the nature of the alleged discrimination.[93] Through a discussion of representative

92 B. Gaze and M. Jones, *Law, Liberty and Australian Democracy* (North Ryde: Law Book Co.,1990), 402.
93 *Barnswell v. National Amusement Company* (1915) 31 WLR 542 (BCCA).

court cases, I show the types of common law claims that were pursued and the ways in which courts disposed of those claims, focusing on the competing conceptions of rights and freedoms and the competing conceptions of the state's appropriate role in managing social relations. As Marshall S. Shapo suggested, the common law judge "semiconsciously capture[s] society's ideas about justice in legal issues framed by specific disputes."[94] This chapter concludes with a discussion of the common law's failures as they were diagnosed and understood by elites. My purpose is not to show that during the middle decades of the twentieth century the common law was, or is today, incapable of being adapted to accommodate egalitarian values or social justice imperatives,[95] rather, I seek to show that the common law, as it was interpreted by judges, was perceived by key elites to have failed as a viable mode of organizing social relations in a diverse society. Notably, this perceived failure of the common law contrasts with its perception historically. "Thinkers in the seventeenth and eighteenth centuries," Kathleen Sullivan suggests, "saw the common law not as an archaic and feudal tradition but as protective of freedom and compatible with modernity."[96]

94 1995: 1569.

95 Some scholars seek to demonstrate that the common law is capable of protecting rights beyond liberty and property, see "Note: The Antidiscrimination Principle in the Common Law," 102 *Harvard Law Review* (1989) 1993; Amnon Reichman, "Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination," 14 *Canadian Journal of Law and Jurisprudence* (2001) 79. Over the past fifteen years, judges in Australia and New Zealand have rediscovered the common law as a means of creatively importing human rights values into domestic jurisprudence. With regard to Australia, see *Mabo v. the State of Queensland [No 2]* (1992) 175 CLR 1. On these developments, see Haig Patapan, *Judging Democracy: the new politics of the High Court of Australia* (New York : Cambridge University Press, 2000), 26.

96 Kathleen Sullivan, "Liberalism's Domesticity: The Common-Law Domestic Relations as Liberal Social Ordering (Ph.D. Dissertation, The University of Texas at Austin, 2002), 16.

PATTERNS OF SOCIETAL DISCRIMINATION

Because property and economic power have historically been enjoyed disproportionately by white men, those positioned to enjoy common law rights have traditionally been white men. Women and racial minorities were often accorded by law an inferior status that denied them the legal capacity to possess property in their name. Until the mid-nineteenth century, a married woman's legal status was similar to that of slaves, convicts, children, and lunatics.[97] After the institution of slavery was abolished in the U.S., the Black Codes were used to limit the ability of blacks to acquire and hold property in the South. In Australia, Canada, and the U.S., indigenous peoples were often deprived of the requisite legal status to hold property. Similar laws were used to limit the ability of Asian minorities to acquire property in the U.S. and Canada.[98] To the extent that one's capacity to possess property was diminished, so, too, was one's capacity to exercise common law rights.

Disproportionate control of physical resources, combined with the common law system of rights, facilitated the maintenance of segregated communities and sent to racial and religious minorities the message that they did not belong. A few cross-national examples illustrate the seriousness of the problem. In *An American Dilemma*, Gunnar Myrdal not only documented the Jim Crow society of the South, but he also captured the de facto discrimination that characterized much of the North. He observed that while African Americans in the North had secured "practically unabridged civic equality in all [their] relations with public authority, whether it was in voting, before the courts, in the school

97 The common law of coverture, as this was known, was changed by statute. Mississippi enacted the first statute that recognized women's legal capacity in 1839, and by 1850 nearly half of the states had enacted their own Married Women's Property Acts. In New Zealand, by contrast, it was not until 1976 that the Matrimonial Property Act was amended to provide that a married woman with the same legal capacities and duties as her husband.

98 See the submission of the National Japanese-Canadian Association to the Special Committee of the Senate on Human Rights and Fundamental Freedoms in *The Senate of Canada—Proceedings of the Special Committee on Human Rights and Fundamental Freedoms* (1950), pp. 269-79. Also see *Union Colliery of British Columbia v. Bryden*, [1899] A.C. 580; *Cunningham v. Tomey Homma*, [1903] A.C. 151.

system or as a relief recipient," they were nonetheless "discriminated against ruthlessly in private relations, as when looking for a job or seeking a home to live in."[99] Thus, if America was to resolve its dilemma, it would need to address both state and non-state discrimination.

Likewise, in Ontario, discrimination against African Canadians was accomplished by private actors rather than by statute.[100] Dresden, a small town in the southwestern part of the province—known as the burial place for the man thought to have inspired the character of Uncle Tom—was a racially segregated community. Most restaurants there discriminated against blacks, who comprised approximately 15% of the town's population;[101] black men were only hired for manual labor; blacks could not use the local barber and beauty shops; and two of the three community swimming pools were segregated.[102] In December 1949, voters in Dresden rejected a referendum proposal in support of a municipal antidiscrimination law by a vote of 517 to 108.[103] During the 1930s, anti-Semitism increased within Ontario and Quebec.[104] Jewish Canadians experienced discrimination with regard to public accommodations, housing, and employment.[105] Hotels and resorts commonly advertised that they catered to an "exclusive clientele," which meant that they refused to serve Jews. Restrictive covenants were used against Jews across Canada. In Nova Scotia,

99 Myrdal, *An American Dilemma*, 1010.
100 See Ida Greaves, *The Negro in Canada* (Orillia, ON: Packet-Times Press, 1930); Robin W. Winks, *The Blacks in Canada: a history* (Montreal: McGill-Queen's University Press, 1971); John C.Bagnall, "The Ontario Conservatives and the Development of Anti-Discrimination Policy: 1944-1962" (Ph.D. Dissertation, Queen's University at Kingston, Canada, 1984), 108-10; Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 122-81. This contrasted with the de jure discrimination directed against Asians.
101 Sidney Katz, "Jim Crow Lives in Dresden," *Maclean's*, 1 Nov. 1949
102 John C.Bagnall, "The Ontario Conservatives and the Development of Anti-Discrimination Policy: 1944-1962," 108-10.
103 Bagnall, "The Ontario Conservatives and the Development of Anti-Discrimination Policy: 1944-1962," 130.
104 Lita-Rose Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties* (Toronto: Fitzhenry and Whiteside, 1975).
105 Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 183-245.

those instruments were used to exclude blacks, whereas in British Columbia, they were directed against Asians.[106]

Similarly, the files of the Department of Maori Affairs in New Zealand contain numerous complaints of racial discrimination by Maori with regard to employment and housing.[107] Some of these complaints even received national media attention. In 1955, for example, Donald Hiki, a Maori, alleged that he had been denied employment with the Huntly Branch of the Bank of New Zealand (BNZ) on account of his race. His accusations garnered national media attention.[108] At the time, no Maori men served as bank officers at the BNZ, but the Bank did employ a couple of young Maori women. According to the Department of Maori Affairs' records, the BNZ preferred that employees "not be of a dark colour" because "some of their depositors were a bit fussy."[109] Five years later, a Department survey of business practices found that for positions involving "face to face" service with the public "there was a strong tendency to deny entry to Maori because of possible adverse and customer re-action."[110] In addition, discrimination existed in housing, hotels, theaters, employment, barbershops, private bars, and lounges.[111]

Societal discrimination was rife in Australia, too. The eminent historian, Ann Curthoys, in a memoir of her experiences as a "freedom rider" in New South Wales in 1965, recounts how many of the same exclusionary practices used in the U.S. and Canada were also used against indigenous peoples in rural towns, most notably at swimming pools and other public places.[112] In 1973, Fred Hollows, well known for his work on indigenous health issues, witnessed firsthand Australia's discriminatory practices. While working in the

106 Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 190.
107 "Non Legal Discrimination" (1 April 1960) MA 36 1/21, p. 1.
108 "No job at bank for Maori," New Zealand Herald, 29 April 1955; "Maori Progress and Problems," The Taranaki Daily News (4 October 1956).
109 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).
110 "Non Legal Discrimination" (1 April 1960) MA 36 1/21, p. 1.
111 "Relations between Maori and European People in New Zealand," MA 19/1/539 (10 May 1960), p. 1.
112 Ann Curthoys, *Freedom Rides: a freedom rider remembers* (Crows Nest, NSW: Allen & Unwin, 2003).

New South Wales town of Enngonia, he was advised by a local hotel operator that the Aboriginal people accompanying him would be served outside at the rear of the hotel rather than in the lounge. Hollows recounted the incident in a letter to the Attorney-General, Lionel K. Murphy, later that month.[113] Finally, during the 1950s and 1960s, Britain's demographic profile began to change as a result of immigration from the Caribbean and the Indian subcontinent.[114] The arrival of increasing numbers of "colored" immigrants generated social tensions, including race riots in Notting Hill and Nottingham in 1958.[115] Many employers and landlords discriminated against the newcomers. As all of these foregoing examples show, private actors operating independently of state support, exercised considerable power over access to public places, employment, and housing.

PUBLIC ACCOMMODATIONS

Challenges to discriminatory exclusion from various venues, such as swimming pools, theaters, restaurants, taverns, and dance halls, constituted the most frequent type of common law claim. The common law traditionally accepted the rule "he who owns may do as he pleases with what he owns,"[116] but courts carved out three main exceptions to that rule. The first and second exceptions pertained to innkeepers[117] and common carriers.[118] Both were placed under a duty to serve all comers, unless a particular customer posed a unique risk, such as through unruly behavior. Courts, for example, exempted innkeepers from liability for refusing service to guests on a number of grounds deemed reasonable.

113 See Hollows, Prof. F. corr. To Murphy, L.K. 26 November 1973 Australian Archives M132 Box 21. Murphy responded with a letter detailing the Racial Discrimination and Human Rights Bills.
114 See Freeman, *Immigrant labor and racial conflict in industrial societies*.
115 Bob Hepple, *Race, Jobs, and the Law in Britain* (London: Allen Lane The Penguin Press, 1968). 130.
116 Gaze and Jones, *Law, Liberty and Australian Democracy*, 401.
117 See *Rex v. Ivens*, 32 E.C.L. 495, 7 C. & P. 213 (1835); Story, *Commentaries on the Law of Bailments* (Schouler, 9th ed., 1878 476); and, "The Liability of Innkeepers" (1947), 203 L.T. 287.
118 See *Chicago etc. R. Co. v. Williams*, 55 Ill. 185 (1870); *West Chester etc. R. Co. v. Miles*, 55 Pa. 209 (1867).

These included turning away individuals who refused to pay for services;[119] who were intoxicated and badly behaved;[120] who failed to meet hygienic standards;[121] or who insisted on bringing dogs into a hotel.[122] By contrast, a number of courts found it unreasonable to refuse service to a person who arrived ill[123] or whom the hotelkeeper personally disliked and no longer desired as a customer.[124]

Scholars disagree about the rationale that underlaid these two exceptions. Anthony Lester and Geoffrey Bindman assert that the duty to serve derived from judges' practical concerns with the speed and safety of travel in medieval England.[125] Some suggest that inns and carriers were regarded as "common" because they offered their services to anyone, absent an explicit contract.[126] In other words, they "held themselves out" to the public. In that sense, inns and common carriers resembled the third type of entity placed under a duty to serve, namely businesses granted a state monopoly or position of privilege.[127] Scholars in the law and economics school of thought, such as Richard A. Epstein,[128] contend that as a general principle the duty to serve stems from a desire to combat the dangers of monopoly, be it a licensed business, an inn, or a common carrier. They reject the idea that private property is converted into public space simply by virtue of its owner holding out its services to the public.

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119 *Doyle v. Walker* (1867), 26 U.C.Q.B. 502; *Bellairs v. Yale Hotel Calgary Ltd.*, [1936] 1 W.W.R. 316 (Alta D.C.). But cf. *R. v. Ivens* (1835) 7 C. & P. 213, 217.
120 *R. v. Ivens* (1835) 7 C. & P. 213; *Hawthorn v. Hammond* (1844), 1 Car. & Kir. 404, 407.
121 *Pidgeon v. Legge* (1857), 21 J.P. 743, per C.B. Pollock and B. Bramwell.
122 *R. v. Rymer* (1877), 2 Q.B.D. 136.
123 *R. v. Luellin* (1701), 12 Mod. 445.
124 *Kenny v. O'Loughlin* (1944), 78 Ir. L.T.R. 116.
125 1972: 63.
126 Walker, "*Race," Rights and the Law in the Supreme Court of Canada*, 144.
127 See Henry L. Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation," XLVI *The Canadian Bar Review* (1968): 612-42, 632, 637. See *Bolt v. Stennett*, 8 T.R. 607, 101 E.R. 1572; *Simpson v. Attorney-General*, 74 L.J. Ch. 1:
128 Epstein, *Forbidden Grounds*, 84-87.

In the hands of judges, innkeeper, common carrier, and a monopolistic enterprise all became terms of art with very specific meanings.[129] Thus, if a business could establish that it was a private hauler, a lodging-house, or a private hotel, then it was not obligated to serve all comers.[130] In order for the duty to serve to apply, courts had to determine first whether the parties satisfied the legal definitions of "guest" and "innkeeper," and second, whether the refusal of service was "reasonable." Judges often disposed of plaintiffs' claims by finding that an establishment did not meet the requisite criteria to be considered an inn. In Canada, for example, where blacks were refused service in restaurants and taverns, recourse to the duty to serve proved unsuccessful because the courts simply found that the defendants' premises were not inns and refused to extend the duty to additional entities.[131]

Christie v. York Corp. [1940] 1 D.L.R. 8, serves as a key exemplar of this line of jurisprudence. Although the case arose in the civil law province of Québec, it is important because courts in the common law provinces relied upon it as precedent.[132] Born in Jamaica, Fred Christie had been a resident of Montreal for over twenty years and a frequent patron of the York Tavern, an establishment situated adjacent to the city's largest black neighborhood. In 1936, the tavern relocated to the Montreal Forum. Although Christie, as well as other blacks, had frequented the previous location on numerous occasions, the management instructed employees not to serve them on the new premises. On his first visit there, Christie's repeated requests for service were denied. He called the police, who advised him that there was nothing under the law they could do. Christie subsequently sued the tavern for breach of contract and in tort, citing the humiliation that he had suffered, and he claimed two hundred dollars in damages. His attorney argued that because the tavern had a public

129 See Molot, "The Duty of Business to Serve," 615-16.
130 Quintin Hogg, "Race Relations and Parliament" *Race*, XII, 1 (July, 1970): 1-13, 3.
131 See *Franklin v. Evans* (1924) 55 OLR 349; *King v. Barclay* (1966) Que. C.S. (1965).
132 See *Rogers v. Clarence Hotel Co. Ltd.* at 584, where Chief Justice B.C. MacDonald concludes that Christie enunciated the general principle that "a merchant or trader, not engaged in a monopolistic or privileged enterprise, may conduct a business in the manner best suited to advance his own interests."

license and because it publicly advertised its sale of beer, it had offered an implicit contract, which it then broke by refusing service.[133] He also used the courtroom as a forum in which to prove that the problem of racial discrimination was common within the city. Counsel for the tavern's owner countered that his business was "'a private enterprise for gain'" and that his denial of service was within the tavern owner's right to protect his "'business interests.'"[134] Moreover, he suggested that Christie was spared humiliation by the quiet and polite way in which the tavern's staff had refused service.

During the hearing, Justice Philippe Demers suggested that the case posed "'a question of rights,'" specifically whether the tavern possessed "'the right to refuse a man on account of his color.'"[135] He concluded that the refusal to serve blacks was illegal according his reading of sections 19 and 33 of the Quebec License Act. Section 33 provided that "no licensee for a restaurant may refuse, without reasonable cause, to give food to travelers," and section 19 defined a restaurant as "an establishment, …, where in consideration of payment, food (without lodging) is habitually furnished to travelers." Further, a traveler was defined as "a person who, in consideration of a given price … is furnished by another person with food or lodging or both."[136] In Demers' view, beer qualified as nourishment and thus as food, and Christie qualified as a traveler. He awarded Christie twenty-five dollars, plus the costs of the action. The tavern owner appealed.

The Court of King's Bench reversed the lower court's decision on a five-to-four decision. The majority concluded that there was no contract. One justice argued that no contract existed because Christie had been immediately refused service, before a bargain could be struck. Another denied that a contract had been formed because, in his opinion, the tavern's general advertising constituted an invitation to buy and not an offer to sell, the

133 Walker, *"Race," Rights and the Law in the Supreme Court of Canada*,151-52.
134 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 153.
135 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 154.
136 RSQ 1925 c. 25, §§19, 33.

latter being required for contract formation. The majority also found that the duty to serve established by the Québec License Act applied to restaurants and hotels, but not to taverns. "The fact that a tavern-keeper decides in his own business interests that it would harm his establishment if he catered to people of colour cannot be said to be an action which is against good morals or public order," observed the majority justices.[137] James W. St. G. Walker observed that no one at trial challenged the contention that white patrons preferred not to associate with blacks.[138] In fact, to the contrary, the evidence indicated that such prejudice was common and generally acceptable. In its decision, the court favored a principle of freedom of commerce over a principle of equality. One justice explicitly stated that the case did not call upon the court "to express any opinion upon the abstract philosophical concept that all men are born equal."[139] The dissenting justice, Antonin Galipeault, by contrast, formulated the issue in terms of the patron's liberty rather than that of the proprietor. He asserted that as a British subject, and as a willing and suitable customer, Christie had a right to buy beer at a public establishment, which the York Tavern in his opinion surely was, and further that a contract had, in fact, been formed. Christie, nevertheless, lost. His defense team issued a public plea to Montreal's black community for more funds to support another appeal, venturing that the Supreme Court would not uphold "'this malicious principle of racial discrimination, which is certainly contrary to British principles and traditions.'"[140]

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137 *Christie* at 124-25. Subsequent common law cases affirmed the right of business owners to make such decisions based upon their judgment. See *Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe* [1958] 2 All E.R. 220, where England's Court of Appeal stipulated that the proprietors of the ballroom were entitled to maintain a color bar deemed to be in their business interest; and, *Re Lysaght, Hill v. Royal College of Surgeons* [1965] 3 W.L.R. 391, 402, where Justice Buckley accepted that "racial and religious discrimination is nowadays widely regarded as deplorable in many respects," but nevertheless asserted that it was "going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith, or to exclude adherents to a particular faith, is contrary to public policy…. It is undesirable but it is not, …, contrary to public policy."

138 *"Race," Rights and the Law in the Supreme Court of Canada*, 168.

139 *Christie* at 112.

140 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 158.

Christie, however, would be disappointed. The Supreme Court of Canada framed the issue not as one concerning the legality of discrimination per se, but rather as an issue of the York Tavern's right to refuse service at its own discretion.[141] Christie's legal counsel argued the moral impropriety of racial discrimination and further argued that it undermined public order. Such discrimination, he claimed, was insulting, slanderous, and degrading.[142] The tavern's attorney countered that maintenance of a color bar was a business decision based upon an assessment of white prejudice against "'drinking in company with negroes'" and further that such a policy was "'common in the better class of establishments'" in the city.[143] Further, he argued that absent special statutory provisions, merchants were not under any "'duty to enter into a contractual relationship with anyone.'"[144] A majority of the Supreme Court agreed, affirming the general principle of complete freedom of commerce. "Any merchant," it ruled, was "free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either."[145] Moreover, the majority suggested that the tavern's policy did not abridge good morals or threaten to undermine public order.

Again, there was a lone dissenter. Justice Henry Davis argued that because Québec had established "complete governmental control" over the sale of beer and forbade its sale by anyone not holding a "special privilege," the holder of a permit lacked "the right of an ordinary trader to pick and choose those to whom he will sell."[146] It was, therefore in his opinion, a matter for the legislature to determine whether taverns should maintain exclusionary policies. Christie lost, and, adding insult to injury, he was required to pay the

141 [1940] SCR 139.
142 Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 159, 160.
143 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 160.
144 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 160.
145 SCR at 146.
146 SCR at 147-48.

tavern's costs.[147] The outcome of the case drew little public attention. Writing of the Christie decision, law professor Bora Laskin characterized the "principle of freedom of commerce enforced by the Court majority" as "merely the reading of social and economic doctrine into law, and doctrine no longer possessing its nineteenth century validity" due to the state's increased regulation of the economy.[148] Over the ensuing years, a number of legal commentators would look upon the majority opinion with disdain, arguing that the court could have decided the case differently.[149]

Nevertheless, *Christie* served as precedent for subsequent cases. In *Rogers v. Clarence Hotel Co. Ltd.* [1940] 3 DLR 583, Rogers sued a beer parlor operator after she refused to serve him beer in her premises solely on account of his race. The defendant admitted that she refused service on account of the man's color, but argued that that she was entitled to exercise unfettered discretion to refuse any patron, without being obliged to show reasonable cause for doing so. The trial court awarded Rogers twenty-five dollars in damages, finding that Government Liquor Act, R.S.B.C. 1936, had affected the sale of beer with a public interest. The Court of Appeals, however, reversed that decision. There, the majority judges endorsed the principle of freedom of commerce espoused in *Christie*.

In a dissenting opinion, Justice Cornelius O'Halloran described the plaintiff as "a British subject," and "a taxpayer," who had lived in Vancouver for some twenty-two years.[150] He asserted that it was "contrary to the common law to refuse to serve a person solely because of his colour or race" because all British subjects possess the same rights and privileges under the common law, irrespective of "class, race or religion."[151] Such

147 Costs amounted to $594.43, see Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 164, fn. 206.
148 1940: 314.
149 Molot, "The Duty of Business to Serve," 612, 641; Tarnopolsky and Pentney, *Discrimination and the Law in Canada*, 76.
150 *Rogers* at 3 DLR at 586.
151 *Rogers* at 3 DLR at 588.

discrimination was, thus, unreasonable. O'Halloran also asserted that the defendant advertised her establishment and thus held it out to the public without reservation or limitation. Moreover, the provincial licensing requirement "removed beer from the sphere of commerce and made it instead a governmental enterprise conducted by the Government for the good and welfare of the people."[152] For these reasons, it did not matter that the parlor was not a monopoly.[153] He recognized that the court was being called upon to weigh two competing rights, the right of the beer parlor operator to refuse the respondent and the right of the respondent to be served. One must necessarily give way to the other, and O'Halloran concluded that based upon the facts presented, the right to be served should prevail.[154] In response, one commentator in the Canadian Bar Review asserted that O'Halloran had gotten it wrong. The common law, in his opinion, only entailed equal treatment "under the law or before the Courts or as against the Crown or government," but it did not apply between private individuals.[155]

Racial discrimination was also common in theaters and other places of entertainment. Into the 1930s, for example, theaters in Windsor, Ontario designated separate seating areas for black patrons, which were often known by such derogatory names as "Crow's nests" or "Monkeys' cages."[156] On one occasion, a riot broke out at the Empress Theatre in Victoria, British Columbia, when a group of African Canadian citizens abrogated local convention by taking seats in the dress circle.[157] *Sparrow v. Johnson* (1899) 15 CS 104, another Canadian case, involved a legal challenge to this practice. There, Justice John Sprott Archibald of the Québec Superior Court awarded Frederick Johnson fifty dollars in damages for humiliation on a breach of contract claim. Johnson and a guest had been refused seating

152 *Rogers* at 3 DLR at 593-94.
153 *Rogers* at 3 DLR at 598.
154 *Rogers* at 3 DLR at 592-93.
155 *Canadian Bar Review*, 17 (1940): 730-32.
156 Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 131.
157 Winks 1971: 283-84.

in the orchestra section of the Academy of Music on racial grounds, after he had been erroneously sold the tickets by a clerk who thought that Johnson was on an errand for a white patron. Archibald framed the case in terms of two separate issues: first, could the theater restrict black customers to certain sections, and second, was there a contract for the seats? With regard to the first, the judge characterized such racially discriminatory policies as relics of the "prejudices created by the system of negro slavery." "Our constitution," he argued,

> is and always has been essentially democratic, and it does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community. … I should certainly hold any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions."[158]

For him, it did not matter that the "regulation" was issued by a private, as opposed to a state, institution. With regard to the second, more technical issue, Archibald analogized theater-goers to hotel guests and held that theaters were under a duty to serve. Like hotels, he reasoned, theaters required public licenses and operated under municipal regulations. They are thus not strictly private enterprises and not free to discriminate among their customers. Archibald, therefore, found a breach of contract.

On appeal, however, the Québec Court of Queen's Bench upheld the decision, but on narrower grounds. It rejected the analogy between hotels and theaters, and thereby denied that theaters were under a duty to serve. Because Johnson had purchased the tickets, however, it found that the Music Academy had breached its contract, and it awarded him the cost of the tickets in damages.[159] In the U.S., too, courts often refused to place theaters under a duty to serve, even though they recognized that theaters were licensed by the state and thereby affected by a public purpose. Such licensing, courts concluded, was for the

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158 *Sparrow*, 15 CS at 106.

159 See also *Barnswell v. National Amusement Company* (1914) 21 BCR 435; (1915) 31 WLR 542 (BCCA).

purpose of generating revenue and, as such, did not constitute a state franchise to initiate and conduct business.[160]

On those occasions in which an inn was held liable for breaching its duty to serve, the available remedies awarded by the courts seemed inadequate to redress the nature of the harm suffered. In *Constantine v. Imperial Hotels* [1944] K.B. 693, for example, Sir Learie Constantine, a famous West Indian cricketer, was refused accommodations at the Imperial Hotel in London because his presence, it was contended, might offend American guests.161 Although it was disputed at trial, Constantine's witnesses testified that the manager had said "'We won't have niggers in this Hotel.'"[162] Constantine prevailed in his suit, but he was awarded a mere £5 in damages, although the judge expressly recognized that Constantine suffered "unjust humiliation and distress."[163]

These court decisions influenced the thinking of government officials. During the early decades of the twentieth century, on various occasions and upon experiencing discrimination, aggrieved individuals approached Canadian government officials for advice. In 1912, for example, the Edmonton Capital reported that two blacks were denied bar service in two hotels. When asked what recourse was available, an official from the Attorney General's Department reportedly replied that although the province gives the hotel keeper a right to sell liquor, "'it cannot compel him to sell to anyone if he does not wish to do so.'"[164] Four years later, another group of African Canadians asked the federal government whether racially discriminatory practices by private actors were legal. The Deputy Minister of Justice advised them that no legislation spoke to the issue of private discrimination; rather, he said,

160 See *People ex rel. Burnham v. Flynn*, 189 N. Y. 180; *Collister v. Hayman*, 183 N. Y. 250; *Aaron v. Ward*, 203 N. Y. 351.
161 See Learie 1954; Jowell 1965: 172
162 Quoted in Hepple, *Race, Jobs, and the Law in Britain*, 102.
163 *Constantine v. Imperial Hotels* [1944] K.B. 693, 696.
164 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 131.

"'[t]he remedy is in the court.'"[165] He failed to explain that the courts were likely to uphold the right of a property owner to exclude individuals from his property on the basis of race. The Deputy Attorney General of Ontario was more forthcoming in his explanation of the common law in a 1929 letter to a group of concerned African Canadians. He wrote,

> "Coloured people have exactly the same rights as others in the matter of public places of entertainment, but as the obligation of a proprietor to sell seats in his theatre or meals in his restaurant does not ordinarily exist, he can refuse to sell to Negroes if he pleases, just as he could refuse to sell to any other person or class of people, as long as the refusal is not accompanied by insult or violence."[166]

The common law right to exclude influenced public thinking about how to respond to racial discrimination in Canada. In 1936, for example, a Toronto hotel denied a black singer, and hotel guest, access to its dining room. In its coverage of the incident, the magazine Saturday Night asserted that such behavior constituted "'an intolerable anomaly in a free, liberal and supposedly Christian country,'" but in its opinion, private initiative rather than state action constituted the appropriate response.[167] It thus observed that the "'only feasible way of dealing with the situation appears to be the establishment of international clubhouses in the larger urban centers in which foreigners of any race, color, religion or political philosophy, provided that they are personally acceptable, will be admitted to the full enjoyment of all privileges.'"[168] Essentially, it identified a niche market for some entrepreneur to exploit, rather than a need to create an obligation upon businesses not to discriminate on grounds of race.

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165 Quoted in Walker, "*Race," Rights and the Law in the Supreme Court of Canada*. 143-44.
166 Quoted in Greaves 1930: 62.
167 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 131.
168 Quoted in Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 131.

REAL ESTATE TRANSACTIONS

Individuals desiring to maintain a segregated community did not have to rely upon local ordinances to achieve it. They could attach a restrictive covenant to their property deed. A covenant resembles a contract in that a violation gives rise to a cause of action for damages or an injunction. Property covenants restrict the sale of land, thereby abridging the principle that the sale of property should be unrestrained; however, partial restrictions, which did not totally inhibit the free enjoyment and disposal of property, were generally accepted. These restrictions typically prohibited the transfer of property interests to individuals belonging to particular racial, religious, or ethnic groups for a specified period of time.[169]

In Canada, a number of courts had heard various challenges to restrictive covenants, but none had directly addressed the legality of those instruments.[170] In 1945, however, Justice Keiller Mackay of the Ontario High Court heard the case *Re: Drummond Wren* [1945] OR 778, which directly challenged a restrictive covenant targeting "Jews or persons of objectionable nationality." Mackay struck down the covenant on three grounds. First, he argued that such instruments were contrary to public policy and that it was an established practice of common law courts to use "the doctrine of public policy as an active agent in the promotion of the public weal."[171] Second, because the covenant was not temporally limited in duration, Mackay found the covenant to be an improper restraint on alienation, and third, he determined the language concerning the prohibited classes to be uncertain, thus rendering the covenant void. By 1945, no American court that had ruled upon the legality of such

169 See Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley and Los Angles: University of California Press, 1959).
170 See *Essex Real Estate v. Holmes* (1930) 38 OWN 392; *Re: Bryers and Morris* ((1931) 40 OWN 572; *Re: McDougall and Waddell* [1945] OWN; [1945] 2 DLR 244.
171 *Re Drummond Wren* at 678-79. On public policy and the common law, see C.J. Tindal in *Homer v. Graves* (1831) 7 Bing. 735, 743, where he states that "[w]hatever is injurious to the public is void."

restrictive covenants had struck them down. Instead, those courts generally deemed them valid, absent an explicit legislative prohibition against such covenants.[172] This changed in 1948 with the U.S. Supreme Court's decision in *Shelley v. Kraemer*, 334 U.S. 1, which found that state courts could not be used to enforce restrictive covenants because such enforcement would constitute "state action" and thereby violate the Equal Protection Clause of the Fourteenth Amendment.[173]

Three years after the decision in *Re: Drummond Wren*, the Ontario High Court heard another challenge to a restrictive covenant directed against Jews. *Noble and Wolf v. Alley*, [1948] OR 579, arose out of a restrictive covenant against Jews that was contained in a property deed for a beach house at a lakeside resort. Upon discovering the covenant, Bernard Wolf, who had agreed to purchase the property, sought a judicial determination of the covenant's legality so as to ensure clear title prior to his purchase. In this, he was opposed not by the seller, Annie Maud Noble, but rather by a group of adjacent property owners within the resort community. At the hearing, counsel for the Beach O'Pines Association argued that since that association had been formed in 1935, few changes in ownership had occurred, thereby stressing the intimacy of the community.[174] Wolf's attorney advanced the arguments that had prevailed in *Re: Drummond Wren*. Justice Schroeder, showing his hand during the hearing, announced that in "protecting the rights of minorities, we must not lose sight of the rights of the majorities as well."[175] He ultimately ruled that the restrictive covenant was valid for three reasons. First, it contained an expiration date (1 August 1962), making it a partial and thus permissible restriction. Second, contrary to precedents,[176] Schroeder found that one could determine with sufficient certainty

172 See Vose, *Caucasians Only*, pp. 23-38.
173 For a discussion of the "state action" doctrine, see Chapter Three, infra.
174 *Noble and Wolf*, OR at 580-82.
175 See Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 208.
176 See *Clayton v. Ramsden* [1943] 1 All ER 16.

whether an individual was Jewish. And third, he rejected the argument that such restrictions were against public policy, asserting that guarding against interference with freedom of contract was of paramount importance.[177] Moreover, Schroeder observed that the property involved a summer home rather than basic shelter, suggesting that the property was not a necessity and that it was imbued with a special sense of community.

Before the Ontario Court of Appeal, counsel for the Beach O'Pines Association invoked the *Christie* decision and argued that freedom to choose one's associates advances an important public interest, namely that of facilitating a pluralistic society and guarding against the "complete regimentation" of society.[178] The Court sustained the decision. Chief Justice Robertson suggested that the covenant was simply intended "to assure, …, that the residents are of a class who will get along well together," an effort that he characterized as "innocent and modest" rather than "criminal or immoral." He further asserted that laws were "impotent" in the development of public sentiments. Such a constrained view of the law's capacity to shape society, in Robertson's opinion, undoubtedly restrained Canadian legislators from enacting, "and should restrain[Canadian] Courts from propounding, rules of law to enforce what can only be of natural growth, if it to be of any value to anyone.[179]

Wolf appealed to the Supreme Court of Canada.[180] There, counsel for the Association argued that *Christie* had established "the right of persons to deal with whom they pleased." Further, he asserted that if the Court accepted Wolf's argument then it was essentially accepting the proposition that "we must all think and act in the same way." This, he argued, would engender "a dead level of uniformity in the community which is one of the badges of totalitarianism, whether of the Fascist or Communistic type." The imposition of such uniformity was inappropriate for "a country of minorities" like Canada, and it would

177 *Noble and Wolf*, OR at 597.
178 *Noble and Wolf v. Alley* [1949] OR 503, 509-12.
179 *Noble and Wolf*, OR at 509-12.
180 *Noble and Wolf v. Alley* [1951] SCR 64.

render illegal a number of minority organizations, including St. George's and St. Andrew's Societies, the Knights of Columbus and B'Nai B'rith.[181] A majority of the Court struck down the covenant, concluding that it was void for uncertainty, and the Court made no comment as to whether restrictive covenants advanced or abridged public policy.

A *Globe and Mail* editorial embraced the decision in *Noble and Wolf*.[182] It maintained that restrictive covenants did not involve the rights of minorities but rather involved the freedom of members of the majority group to choose their associates in their private lives, a freedom whose protection from governmental interference was as essential as the safeguarding of the rights of minorities. It was at least partly through the erection of discriminatory barriers that members of the majority group had established the basis for harmonious relations between themselves and members of minority groups, the *Globe and Mail* contended. A contrary decision by the Court, the newspaper concluded, would have damaged relations between different ethnic and religious groups rather than improved the situation of minorities.[183] The paper's views did not differ greatly from those expressed by the *Windsor Herald* in 1855. Then, writing with regard to the city's segregated housing patterns, the *Windsor Herald* suggested that if blacks were prohibited from living within a certain part of the city then "let them avoid it" and make their homes elsewhere. If, however, "they endeavor to force themselves into positions where they are not wanted, under the idea that the British constitution warrants them in so doing, they may discover in the end that the privileges which they now enjoy will become forfeited."[184] Not all editorial boards in 1949 shared the *Globe and Mail's* view, however. A *Toronto Daily Star* editorial, for

181 *Noble and Wolf*, SCR at 68.
182 See "Tolerance and Law," *Globe and Mail*, 11 June 1949; Bagnall, "The Ontario Conservatives and the development of anti-discrimination policy," 126.
183 See Bagnall, "The Ontario Conservatives and the development of anti-discrimination policy," 127.
184 Quoted in Daniel G. Hill, *The Freedom Seekers* (Agincourt: Book Society of Canada, 1981), 105

example, asserted that the decision in *Noble and Wolf* contradicted Canada's commitment to the UN Charter and to the Universal Declaration of Human Rights.[185]

New Zealand's only reported common law case concerning a claim of racial discrimination involved a real estate transaction. In *Lempriere v Burghes* [1921] NZLR 307, 309, Chief Justice Stout held that it would be arbitrary and unreasonable for a lessor to refuse to consent to the assignment of a lease simply because the proposed assignee was Chinese. His ruling, however, did not absolutely reject "racial" objections to assignments. Rather, it turned in part on his characterization of the nature of the Chinese people residing in New Zealand.[186]

EMPLOYMENT DISCRIMINATION

The common law also failed to recognize racial discrimination in employment as a distinct legal wrong in and of itself. The idea of contractual freedom implied an absolute right on the part of the employer to discriminate in his choice of employees.[187] Lawyers representing a victim of discrimination were required to convince courts that "racial discrimination was the way in which some recognized wrong was committed." For example, Bob Hepple suggests lawyers would have had to show that an individual was deprived of employment as the result of actions taken by a group pf persons that "amounted to the vaguely defined civil wrong of 'conspiracy to injury.'" Victims were unlikely, in Hepple's opinion, to prevail with such an indirect cause of action.[188]

In *Weinberger v. Inglis* [1919] A.C. 606, the House of Lords refused to find that the London Stock Exchange had acted in an arbitrary and capricious manner when it denied

185 See Bagnall, "The Ontario Conservatives and the development of anti-discrimination policy."
186 For a similar English case involving the transfer of a lease, see *Mills v. Cannon Brewery Co. Ltd.* [1920] 2 Ch. 38.
187 *Allen v. Flood* (1898) A.C.1.
188 Hepple, *Race, Jobs and the Law in Britain*, 91.

Hugo Weinberger's request to renew his membership, which he had continuously held for twenty-one years, for the reason that he had been born in Bavaria, Germany. Anti-German sentiment was rampant and it mattered not that Weinberger had been a British subject for thirty years, had an English-born wife, and had children who were deeply involved in Britain's war effort. Their Lordships found that the Stock Exchange committee that rendered the decision possessed "wide and absolute discretion."

In *Nagle v. Feilden* [1966] 2 Q.B. 633 (C.A.), the Privy Council took a strikingly different position. It explicitly considered public policy in deciding whether the refusal of the Jockey Club to grant a trainer's license to a woman for reason that its policy was sexist was invalid because against public policy. Lord Denning stated that as a general principle an individual "has a right to work at his trade or profession without being unjustly excluded from it at the whim of those having governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it." This case, however, applied only where a monopoly controlled access to a trade or profession; thus, it applied to licensing bodies, professional associations, or trade union control of a closed shop.[189] The case was decided two years before Parliament enacted legislation prohibiting racial discrimination in employment and nine years before similar legislation prohibited sex discrimination in employment. Anthony Lester and Geoffrey Bindman lauded this rare example of a court drawing upon changing social values in its development of the common law, but they cautioned that even the most creative jurists could not develop the common law in a way that would redress the most common forms of racial discrimination in employment.[190] The common law could not, they observed, "compel an ordinary employer to recruit workers, or

189 The Court of Appeal applied the principle articulated in Nagle to a case in which it found that a union's power to withdraw a member's union card essentially deprived that member of his livelihood, see *Edwards v. Society of Graphical and Allied Trades* [1971] Ch. 354.

190 Lester and Bindman, *Race and Law in Great Britain*, 52.

to train or promote them, or to provide conditions of work for them, without racial discrimination."[191]

CRITIQUE OF THE COMMON LAW

In liberal polities, the construction of rights and obligations owed between citizens was accomplished through the common law of contract, property, and torts. Under these laws, commercial areas of life, such as theaters and taverns, could be regarded as private, and proprietors of such establishments could discriminate among their patrons. In enforcing that right, courts indirectly gave such private acts of discrimination the force of law.[192] With some exceptions, courts generally adhered to classic liberal values of property and contract, and they elected not to use their authority to develop the common law in an egalitarian direction through creative interpretations of public policy. As counsel for various defendants argued, an individual's right to freedom of association was also protected alongside the rights of property and contract.[193]

Epstein notes that in the course of his research, no one was able to refer him "to any book or article that states in systematic terms the modern case for the antidiscrimination laws against their common law alternatives."[194] The common law was criticized for being too "passive."[195] According to its principles, New Zealand law professor Kenneth Keith observed, "nobody is under an obligation to enter a contract with another—whether the contract is to sell or let a house, to employ, to lend money, to insure."196 Refusal to contract with an individual on account of race was thus not actionable. This was especially

191 Lester and Bindman, *Race and Law in Great Britain*, 52-53.
192 Lester and Bindman, *Race and Law in Great Britain*, 50.
193 Kairys 2001: 1880.
194 Epstein, *Forbidden Grounds*, 7.
195 Lester and Bindman, *Race and Law in Great Britain*, 57
196 Kenneth J. Keith, "The Race Relations Bill," in W.A. McKean (ed.), *Essays on Race Relations and the Law in New Zealand* (Wellington, New Zealand: Sweet & Maxwell (N.Z.) Ltd., 1970), 57-80, 61

lamentable, Keith suggested, in the "vitally important areas" of "employment and housing," where "the common law provides virtually no help."197 Either the individual accused of discrimination committed no legal wrong at all or, if he had, he could be held liable for damages but could not be obliged, in the case of employment, to continue to employ the aggrieved worker. Anthony Lester and Geoffrey Bindman contended that this was too deferential to private contractual law-making.[198]

Canadian commentators declared the human rights protections offered by the common law to be bankrupt. Judges, it was argued, generally "chose the interest of commerce over human dignity."[199] And, they proved that the common law "could not deal adequately with problems of the unfair treatment of people on racial grounds."[200] Common law cases involving allegations of discrimination constituted a competition between the "philosophy of laissez-faire" and "historical and social realities" and, Henry L. Molot observed, judges chose the former.[201]

The values of classic liberalism were embodied in the common law. The common law presumes individuals to be "autonomous and interchangeable," and thus equal.[202] Not all individuals had equal access to common law rights. As a result, the law failed to account for profound differences in power between institutions, groups, and individuals. It was concerned with protecting the rights of property and contract,[203] and by extension, freedom of association.[204] It was unconcerned with the preferences that motivate individuals to exercise their property and contractual rights in particular ways.[205] Enid Campbell and Harry

197 Keith, "The Race Relations Bill," 64
198 Lester and Bindman, *Race and Law in Great Britain*, 57
199 Tarnopolsky and Pentney, *Discrimination and the Law In Canada*.
200 Lester and Bindman, *Race and Law in Great Britain*, 23
201 Molot, "The Duty of Business to Serve the Public," 621.
202 Gaze and Jones, *Law, Liberty and Australian Democracy*, 402.
203 See Epstein, *Forbidden Grounds*.
204 Bonfield 1965: 119.
205 Gaze and Jones, *Law, Liberty and Australian Democracy*, 401.

Whitmore characterized property rights as "negative," meaning that individuals may do what they wish with their property to the extent that they are not prevented from doing so by the common law or statute.[206] According to Cedric Thornberry, writing in 1965, "in principle, the common law has tended to favour the widest possible ambit of choice—'freedom of contract.'"[207]

The common law did not require special state institutions; rather, it relied upon ordinary courts. However, the state could make its presence felt even if no claim was filed in court. For example, individuals who refused to leave premises the owner of which maintained an exclusionary policy such as a color bar could be compelled to leave by police. Alternatively, the state could defer to the judgment of an individual theater owner if he calculated that his business was better served by a color bar. In effect, common law regimes did not conceive of citizenship in citizen-to-citizen terms.

Judges either took no notice of the exclusionary act, or they sanctioned it. Any effort to determine the appropriate scope of anti-discrimination laws "requires a satisfactory reconciliation of the notion of equal opportunity with the concept of freedom of association[,]" which "is probably the most cherished value with which the advancement of the notion of equal opportunity may seriously conflict."[208] This is because there was a harm that the law did not recognize—a harm to individual respect. Within the practices of liberal states and under the common law it was long held that "[p]rivate individuals were free to make their own decisions on any grounds."[209]

Under the common law, judges determined whether a refusal to serve was reasonable. On occasion, a judge would find that discrimination on grounds of race or

206 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney: Sydney University Press,1966), 233.
207 Cedric Thornberry, "Commitment or Withdrawal? The Place of Law in Race Relations in Britain" *Race*, VII, 1 (July, 1965): 73-85, 74
208 Bonfield 1965: 119.
209 Gaze and Jones, *Law, Liberty and Australian Democracy*.

religion was unreasonable, but for the most part judges deferred to private actors. By the 1940s, however, a growing number of social scientists were repudiating earlier conceptions of race and human nature. According to them, racial and religious prejudice was irrational, in other words unreasonable. Reformers, then, sought to codify a commitment to these new ideas, to legislate that prejudice was unreasonable and to thereby make discrimination unlawful. Owing to the conservative record of the courts, reformers sought to empower state agencies to handle claims of discrimination. Property and contractual rights were used to preserve illiberal prerogatives. In characterizing the common law as "passive," commentators were noting that it did not provide an active role for the state. In the hands of conservative judges, property and contractual rights ignored the problem of discrimination. The cases I have reviewed involved commercial settings, and they did not raise issues of freedom of association, or if they did those issues were not well-developed. In challenging discriminatory treatment through common law actions, plaintiffs placed judges in a position to choose between two conflicting sets of rights.

Chapter Three: The Ideology of Antidiscrimination

According to Ernst B. Haas, long term changes in human aspirations and institutions are linked to changes in the way in which "knowledge about nature and about society is married to political interests and objectives."[210] Our knowledge about nature and society, in other words, shapes the way in which we frame social problems and institutions. This chapter illustrates how paradigm shifts in the social sciences and legal theory rendered antidiscrimination laws a feasible and practical policymaking tool. It further shows how this shift converged with a post-World War II wave of democratic idealism that legitimated state intervention in society by way of antidiscrimination laws. These developments were an important part of the process by which common law rights to contract, property, and freedom of association were reconsidered by legislatures and either circumscribed or supplanted through antidiscrimination laws, which introduced a new element of coercion into state-society relations. I argue that new conceptions of race and human nature, of the power of law, and of the appropriate role of government may be understood as comprising an ideology—what I call the ideology of antidiscrimination—that significantly influenced the ways in which political actors in the Anglo-American countries perceived their political interests and determined their policy objectives.[211] I show how international institutions were pivotal in disseminating these ideas, and I traces general patterns in the development of antidiscrimination laws across the U.S., Canada, and Great Britain.

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210 Ernst B. Hass, *When knowledge is power: three models of change in international organizations* (Berkeley: University of California Press, 1990), 11; see also King, *In the name of liberalism*, 292.

211 An ideology consists of a set of ideas, beliefs, and values concerning the nature of man, the state, society, and the means by which the ideal society is achieved. The concept is used here in its "neutral" as opposed to its "critical," Marxian sense, John B. Thompson, *Studies in the Theory of Ideology* (London: Polity Press, 1984), 4. Although some scholars characterize ideologies as comprehensive and systematic, see Edward Shils, "The concept and function of ideology" in D. Sills (ed.), *International Encyclopedia of the Social Sciences* (New York: Macmillan and the Free Press, 1968), 66, many others use the term in the more constrained way it is used here, see Thompson, *Studies in the Theory of Ideology*, 4, and David Robertson, *The Penguin Dictionary of Politics* (Harmondsworth, Mddx.: Penguin, 1986), 153.

THE AMERICAN ANTECEDENT

The first antidiscrimination laws were enacted by British and American governments during the nineteenth century. When Parliament considered renewing the East India Company's charter in 1833, the government of Earl Gray added a provision that prohibited racial and religious discrimination in the Company's operations in India.[212] This reform reflected the influence exercised by liberals, evangelicals, and humanitarians upon British policy towards India.[213] At the behest of similarly progressive elites—abolitionists—the state of Massachusetts enacted the first antidiscrimination law in America in 1865.[214] It prohibited discrimination on grounds of color or race in any licensed inn, public place of amusement, public conveyance, or public meeting, and it provided that violations be punished by a fine not to exceed fifty dollars.[215] Massachusetts thereby introduced into American thinking "the notion that the state has the affirmative duty to assure to every person, without regard to race or color, equality of treatment in places of public accommodation or resort."[216] The statute's scope was later broadened to include theaters, but an exception "for good cause" was added.[217] No other states followed Massachusetts until New York[218] and Kansas enacted similar laws in 1874.[219]

During Reconstruction, Congress enacted a series of statutes, often over President Andrew Johnson's veto, addressing racial discrimination and violence as part of its effort to

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212 Lester and Bindman, *Race and Law in Great Britain*, 383-418.

213 Bearce 1961: 153.

214 Mass. Stat. 1865, ch. 277; Laws of Mass., 1864-65, at 650.

215 Mass. Stat. 1865, ch. 277, sec. 1, 2; Laws of Mass., 1864-65, at 650.

216 Konvitz and Leskes, *A Century of Civil Rights*, vii.

217 Laws of Mass., 1866, at 242.

218 N.Y. Stat. at Large, vol. IX, at 583-84. It was amended in 188. N.Y. Laws of 1881, vol. I, at 541. On the politics behind the enactment of New York's law, see Ena L. Farley, *The Underside of Reconstruction New York: The Struggle Over the Issue of Black Equality* (New York: Garland Publishing, Inc., 1993), pp. 83-85.

219 Laws of Kan., 1874, ch. 49, § 1.

expand the national government's authority and realize a new set of governing objectives, which included the integration of the newly emancipated slaves into society on more equitable terms.[220] Important citizenship questions were the subjects of popular political debate: Did citizenship encompass political equality and equality before the law, or did it also encompass social equality? The Civil Rights Act of 1866 conferred upon all citizens, irrespective of race, color, or previous condition of servitude, full legal capacity, the equal benefit of the law's protections, and equal punishments under the laws.[221] Although it withstood two separate challenges in the federal circuit courts,[222] the Act's constitutionality, which rested upon a generous interpretation of the Thirteenth Amendment,[223] was questionable. Two years later, the Republican Congress, fearing that its legislative handiwork might be undone by a hostile Supreme Court or subsequent Congress, amended the U.S. Constitution to prohibit states from denying citizens "equal protection of the laws."[224]

The Civil Rights Act of 1875 represented the last gasp of the Reconstruction effort to expand the citizenship rights enjoyed by African Americans.[225] The Act prohibited discrimination on grounds of race, color, or previous condition of servitude in the use of inns, public conveyances, theaters, and other places of public amusement. Violators were subject to criminal and civil penalties in the federal courts.[226] In contrast to the 1866 statute,

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220 Eric Foner, *Reconstruction: A Short History of Reconstruction* (New York: Perennial Library, 1990), xvi; Graham, *The Civil Rights Era*, 3.

221 14 Stat. 39 (1866).

222 *U.S. v. Rhodes*, Fed. Case 16,151 (1866); and *Matter of Turner*, Fed Case 14,247 (1867). See A.C. McLaughlin, *Constitutional History of the United States* (New York:: D. Appleton-Century, 1935), 654-655.

223 The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and further that "Congress shall have power to enforce this article by appropriate legislation."

224 See the U.S. Constitution, Fourteenth Amendment.

225 See James M. McPherson, *The Negro's Civil War: how American Negroes felt and acted during the war for the Union* (New York: Pantheon Books, 1965), 500-08.

226 This Act was formally known as "An Act to Protect All Citizens in Their Civil and Legal Rights," 18 Stat. 335, sec. 1 (1875). On the politics surrounding its enactment, see Foner, *Reconstruction*, 226-27, 233-34, 247. On its enforcement, see S.G.F. Spackman, "American Federalism and the Civil Rights Act of 1875," *Journal of American Studies*, 10 (December 1976): 313-28; John Hope Franklin, "The Enforcement of the Civil Rights Act

the 1875 Act explicitly regulated private actors.[227] Theater owners had not previously been under a common law duty to serve.[228] The 1875 Act, thus, went further than the 1866 Act in that it sought to ensure social as well as political equality.[229] It constituted "an unprecedented exercise of national authority, and breached traditional federalist principles more fully than any previous Reconstruction legislation."[230] Proponents of the Act, such as Charles C. Fairchild, an abolitionist member of the faculty of integrated Berea College in Kentucky, argued that "'[t]he social standing and progress of the colored people [is] a matter of national importance.'"[231]

The U.S. Supreme Court, however, found the Act unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). In its view, neither the Thirteenth nor the Fourteenth Amendment provided a legitimate source of federal authority for the legislation. The Court found that the Fourteenth Amendment empowered the federal government to protect citizens from state discrimination, but that it had not likewise empowered Congress to legislate against discrimination perpetrated by private actors.[232] From this decision sprang the "state action" doctrine.[233] The Court majority reached this result through what Justice John M. Harlan, the lone voice of dissent, described as a "narrow and artificial" interpretation of the

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of 1875," *Prologue*, 6 (Winter 1974): 225-35; Leslie H. Fishel, Jr., "Repercussions of Reconstruction: The Northern Negro, 1870-1883," *Civil War History* (December 1968): 342-43.

227 In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the U.S. Supreme Court determined that 42 U.S.C. §1982, which was originally part of the Civil Rights Act of 1866, applied to private actors as well as to the government. Justices Harlan and White vigorously dissented.

228 See Chapter Two, infra.

229 Richard Bardolph, *The civil rights record: Black Americans and the law, 1849-1970* (New York: Crowell, 1970), 54

230 Foner, *Reconstruction*, 556.

231 Quoted McPherson, *The Negro's Civil War*, 506.

232 According to §1 of the Fourteenth Amendment: "…. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. …" And, §5 states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

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Constitution.[234] In Harlan's opinion, African American access to basic citizenship rights was the driving purpose of the 1875 Act. The need, Harlan observed, was to compel white Americans to recognize the legal right of blacks to be citizens, to enjoy the privileges of citizenship, and to be incorporated into the body politic. He argued for a purposive reading of the Civil War Amendments that would enable the federal government to take actions necessary to realize these objectives. In Harlan's view, discrimination practiced by individuals exercising public or quasi-public functions constituted "a badge of servitude" that Congress could prevent by virtue of the Thirteenth Amendment. The Court's decision in the *Civil Rights Cases* stripped the Fourteenth Amendment of its power to authorize the legislative development of civil rights, although it did not foreclose federal authority from enacting similar legislation under another constitutional provision, such as the commerce clause. By 1883, however, the political context had dramatically changed and Congress was no longer entertaining novel constitutional theories in pursuit of egalitarian ideas. New legislation was, therefore, not forthcoming.

Reconstruction came to an end with the political compromise that resolved the contested presidential election of 1876, and thereafter, the federal government abandoned issues of racial equality, shifting its nation-building efforts westward. Over the ensuing decades, the South's solidly Democratic, and racist, congressional delegation was able to thwart civil rights bills through control of key committee chairmanships and use of the filibuster in the Senate. As a result, despite the introduction of numerous bills into Congress, no federal legislation prohibiting racial discrimination was enacted between 1875 and 1957. In the latter decades of the nineteenth century, the Southern states erected a system of laws—known euphemistically as Jim Crow—that mandated racial segregation in most areas of social life (Woodward 1955). Those laws were enacted under the "police

234 See 109 U.S. (1883).

powers," which afforded states the authority to legislate for protection of the community's "health, welfare, safety, and morals."[235]

In 1896, the U.S. Supreme Court was called upon to determine whether a Jim Crow statute abrogated the Fourteenth Amendment's guarantee of equal protection of the laws. In *Plessy v. Ferguson*, 163 U.S. 537, it ruled that a Louisiana statute requiring racially segregated railway cars was a reasonable exercise of those powers and did not offend the Fourteenth Amendment's equal protection clause. Justice Henry B. Brown, who authored the majority opinion, reasoned that the clause "could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[236] In the decades that followed, Southern states engaged in a wave of Jim Crow lawmaking, segregating everything from schools to cemeteries.[237] In constitutional terms, the Court effectively rendered antidiscrimination legislation a prerogative of the states.

Between 1884 and 1900, however, eighteen American states enacted various antidiscrimination laws comparable to the ill-fated federal law of 1875 (Table 3.1). Tennessee was the only southern state to enact an antidiscrimination law during this period.[238] Just as the South's Jim Crow laws had been construed as a permissible use of state police powers, courts likewise sanctioned antidiscrimination statutes.239 For the most part, these laws produced little social change; they were limited in scope and addressed

235 The term "police powers" does not appear in the U.S. Constitution, but the Tenth Amendment reserves to the states those powers neither delegated to the federal government nor prohibited to the states.

236 *Plessy* at 544. Just as he had done in the Civil Rights Cases thirteen years earlier, Justice Harlan issued a vigorous and lone dissent in *Plessy*.

237 See Bardolph, *The Civil Rights Record*, 130-44.

238 See Bardolph, *The Civil Rights Record*, 126-29.

239 See *Johnson v. Auburn & Syracuse Elec. R.R.*, 222 N.Y. 443 (1918); *Jones v. Kehrlein*, 49 Cal. App. 646, 194 Pac. 55 (1920).

discrimination in specified public places.[240] In terms of the laws' enforcement, aggrieved individuals bore the financial burden of investigating and litigating civil claims, and local police and prosecutors were often reluctant, if not hostile, to enforcing claims filed under criminal provisions.[241] These early antidiscrimination statutes, thus, generated relatively few cases. Moreover, when courts were asked to enforce them, they often construed the laws' provisions narrowly on the ground that they created new rights and obligations previously unknown to the common law.[242] As Richard Bardolph observes, however, the cases pursued under early antidiscrimination laws were "significant nevertheless as expressions of contemporary legal doctrine and as auguries of change." Over time, northern courts grew increasingly receptive to state civil rights claims.[243]

Table 3.1: State Laws Prohibiting Racial Discrimination in Public Accommodations, 1865-1897

1865	**1874**	**1884**	**1885**	**1887**	**1890**	**1895**	**1897**
MA	NY	CT	CO	PA	WA	WI	CA
	KS	IA	IL				
		NJ	IN				
		OH	MI				
			MN				
			NE				
			RI				
			TN				

240 Their terms varied by state Illinois, Michigan, and Minnesota had expansive laws that listed a number of specific places in which discrimination was prohibited, while the laws of Connecticut and Rhode Island applied only generally to public conveyances and places of public accommodation and amusement.

241 McPherson 1965: 509.

242 See *Brown v. J.H. Bell Co.*, 146 Iowa 89, 123 N.W. 231 (1909); *People ex rel. Barnett v. Bartlett*, 169 Ill. App. 304 (1912); *Rhone v. Loomis*, 74 Minn. 200, 77 N.W. 31 (1898); *Kellar v. Koerber*, 61 Ohio St. 388, 55 N.W. 1002 (1899).

243 Bardolph, *The Civil Rights Record*, 155. See *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890), and *Baylies v. Curry*, 128 Ill. 286 (1899).

INTELLECTUAL FOUNDATIONS OF ANTIDISCRIMINATION LAWS

By the middle of the twentieth century, reformers were prepared to turn again to antidiscrimination legislation. This time, however, their efforts rested upon a newly forged set of interrelated intellectual trends that comprised the core of an "antidiscrimination ideology." First, the way in which social scientists conceptualized race changed from an emphasis on heredity to a focus on social conditions, thus yielding a more malleable conception of human nature under which racial animosities are shaped by social environments. Second, social scientists and legal scholars became convinced that law could be effectively employed to shape human behavior. This, however, involved an element of coercion that proponents of antidiscrimination laws had to rationalize as consonant with liberal democracy. A third trend thus entailed the articulation of a more substantive conception of democracy and an emancipatory conception of liberalism, despite coercive elements. In sum, these changes in beliefs about empirical facts, social causation, and liberal democratic rectitude made possible the articulation of new standards of behavior that were defined in terms of rights and obligations.

Much earlier, the Enlightenment had undermined traditional thinking about social hierarchy, challenging feudal categories of serf and noble. Yet, it also facilitated the development of new scientifically devised hierarchies based upon ascriptive characteristics. Elements of such "scientific" and racist thinking were expressed in the writings of Thomas Jefferson,[244] and they maintained a presence throughout American history.[245] Pseudo-scientific theories that purported to identify innate racial differences and to associate non-white races with negative characteristics abounded. They were used to justify the exclusion

244 William Peden, (ed.), Thomas Jefferson, *Notes on the State of Virginia* (Chapel Hill: University of North Carolina Press, 1955), 137-43.

245 See Rogers Smith, *Civic ideals: conflicting visions of citizenship in U.S. history* (New Haven: Yale University Press, 1997)

of native peoples, portrayed as savages, from participation in democratic and capitalist institutions.[246] Theories about the innate inferiority of blacks were used to justify slavery[247] and to support policies of racial segregation, like those found in the American South, as well as immigration policies that barred nonwhites.[248] Democracy was thought to require a racially homogenous population.

Inspired by the French Count Arthur de Gobineau and Englishman Houston Stewart Chamberlain, a number of respected American intellectuals generated a massive volume of scientifically stylized racist theory in the early decades of the twentieth century. They included Henry Fairfield Osborn, Madison Grant, Henry Pratt Fairchild, and Lothrop Stoddard, among others.[249] Cumulatively, this body of work asserted that important and discernible differences distinguished the races from each other and that the survival of civilization depended upon the frank recognition of these differences. In practical terms, it prescribed the exclusion of ostensibly inferior, non-white races through restrictive immigration policies and the physical segregation of blacks from whites in daily life. As various scholars have shown, these prescriptions were frequently legislated into government policy.[250]

The 1940s, however, witnessed an intellectual revolution in the understanding of race and racial difference.[251] Franz Boas, an anthropologist at Columbia University, had begun challenging the tenets of scientific racism during the early decades of the twentieth century,

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246 Morton 1839.

247 Nott and Gliddon 1854; Fitzhugh 1854.

248 Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), chap. 5.

249 See Madison Grant and Henry Fairfield Osborn, *The Passing of the Great Race* (New York: Charles Scribner's Sons, 1916); Henry Pratt Fairchild, *The Melting-Pot Mistake* (Boston: Little, Brown and Company, 1926); Lothrop Stoddard, *The Rising Tide of Color* (New York: Scribner, 1920).

250 See Andrew Markus, *Australian Race Relations, 1788-1993* (St. Leonards, N.S.W.: Allen & Unwin, 1994); Smith, *Civic Ideals*; King, *In the Name of Liberalism*; Desmond S. King, *Immigration, race, and the origins of the diverse democracy* (Cambridge, Mass.: Harvard University Press, 2000).

251 Ashley Montagu , *Man's most dangerous myth: the fallacy of race* (New York: Columbia University Press, 1942).

suggesting that social conditions rather than heredity provided a better explanation of differences between the races.[252] By 1938, Boas and his students had successfully lobbied the American Anthropological Association to pass its first resolution denouncing racism (Degler 1991: 203), just when Adolph Hitler was using eugenic theories to justify his polices against Jews and other minorities. Other scholars, among them Thomas Russel Garth, a professor of experimental psychology, and Otto Klineberg, a social psychologist, analyzed the findings of the scientific racists and found no certain evidence of real racial differences in mental traits.[253] Their research showed that behavioral patterns were fluid rather than fixed and were the product of environmental factors rather than natural laws. As a result, the set of popular beliefs that had been used to rationalize America's racial caste lost their intellectual respectability. "It is significant today," Gunnar Myrdal observed, "that even the white man who defends discrimination frequently … says that it is 'irrational.'"[254]

Klineberg acknowledged the practical implications of his work in a 1945 volume entitled The Science of Man in the World Crisis. In his words, because the "behavior of large national communities is to be ascribed to environmental factors (in the largest sense) and not to germ plasm," their behavior "may change with time and with new conditions." Therefore, "any hope we have of making our own democracy broader and more efficient rests not so much on an improvement in our 'stock' as on making available to the whole community the educational and economic opportunities which pave the way for fuller and richer living."[255] Such arguments were disseminated through numerous books, including

252 Franz Boas, The Mind of Primitive Man (New York: Macmillan Company, 1911), 271-73; Franz Boas, "History and Science in Anthropology," American Anthropology, 38 (1936): 140

253 Thomas Russel Garth, *Race Psychology: A Study of Racial Mental Differences* (New York: Whittlesey House, McGraw-Hill Book Company, Inc, 1931).

254 Myrdal, *An American Dilemma*, 1003.

255 Otto Klineberg, "Racial Psychology" in Ralph Linton (ed.), *The Science of Man in the World Crisis* (New York: Columbia University Press, 1945), 77.

Myrdal's highly influential tome *An American Dilemma*,[256] scholarly articles, and popular publications, such as *Survey Graphic*, which provided a consistent forum for discussion during the 1940s.

Reacting against earlier biological models of human behavior, American sociologists developed a social-psychological model that attributed discriminatory behavior to prejudice, conceived of as a particular set of attitudes, feelings, and beliefs that derived from ignorance and misconception. Prejudiced individuals were portrayed as "irrational" or "immature," as opposed to non-prejudiced individuals, who were considered to be "enlightened."[257] Accordingly, the former needed to be reeducated, but not necessarily punished. Thus, the goal was not only to improve the condition of blacks, but also to transform the consciousness of whites. Proponents of these ideas exuded a high degree of optimism, best captured in the words of sociologist Gordon Allport,[258] who expressed his "faith … that the forces in society and in personality can be controlled if they are understood." In its landmark report, *To Secure These Rights,*[259] the President's Committee on Civil Rights made the impact of discrimination explicit, emphasizing that "'[d]iscrimination in employment damages lives, both the bodies and the minds, of those discriminated against and those who discriminate.'"[260]

These new conceptions of race and racism were linked to broad issues of nation-building in the new postwar political context.[261] Columbia University sociologist Robert MacIver played a prominent role in disseminating the ideas through his work with the Institute for Religious Studies, a graduate school established at the Jewish Theological

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256 Myrdal, *An American Dilemma*, 1003.

257 Allport, *The Nature of Prejudice*, 515.

258 Allport, *The Nature of Prejudice*, 515.

259 President's Committee on Civil Rights, *To Secure These Rights*, (New York: Simon and Schuster, 1947).

260 President's Committee on Civil Rights, *To Secure These Rights*, 53, quoting an unnamed source.

261 See Allport, *Controlling Group Prejudice*.

Seminary of America that maintained a keen interest in issues of prejudice and discrimination.[262] MacIver served as editor of a series of books published by the Institute, the titles of which are indicative of its interests: *Group Relations and Group Antagonisms* (1944), *Civilization and Group Relationships* (1945), and *Unity and Difference in American Life* (1947).

Sociologists of the late nineteenth and early twentieth centuries, such as Herbert Spencer and William Graham Sumner,[263] had espoused the idea that human behavior was guided by enduring customs and deeply rooted beliefs that were virtually impervious to planned social change through legal measures. From their perspective, any attempt to coerce racial commingling would engender disharmony, resentment, and perhaps even a violent backlash. Thus, legal action against discrimination would do more harm than good. By the 1950s, however, a number of studies purported to show that when individuals of different races were forced to coexist in some aspect of daily life, prejudice decreased and generally harmonious relations prevailed. Laws prohibiting discrimination, it was contended, give support to those who do not wish to discriminate, but who feel compelled to do so by social pressure.

By the mid-twentieth century, consequently, the law emerged as a favored instrument for accomplishing social engineering.[264] Arnold Rose, another influential sociologist, argued that just as law and power can be used to increase social prejudice, so too the law can be used combat prejudice.[265] In his opinion, researchers had to move forward to consider two new questions. First, how can antidiscrimination laws be enacted in a democracy? Rose

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262 The Institute operated with the cooperation of Catholic, Jewish, and Protestant scholars. It was established through a gift from Lucius N. Littauer.

263 See Robert L. Carneiro (ed.), Herbert Spencer, *The evolution of society; selections from Herbert Spencer's Principles of sociology* (Chicago: University of Chicago Press, 1967); Sumner, *Folkways*.

264 Lee and Humphrey 1943; Pound 1942; Brophy 1945; Maslow 1946; Carr 1947; Saenger and Gilbert 1950; Deutsch and Collins 1951; MacIver 1952: vii; Berger 1952: 3; Lohman and Reitzes 1952; Harding and Hogrefe 1952; Saenger 1953: 256-76; Wilner at al. 1955; Kephart 1957; Works 1961; Russell 1961; Pettigrew 1968: 280.

265 Arnold Rose, *Race prejudice and discrimination: readings in intergroup relations in the United States* (New York, Knopf, 1951), 554.

observed that the Fair Employment Practices Commission had been established by executive order and thus lay outside "typical democratic processes."[266] Second, "how can the laws be made most effective in reducing prejudice and least disruptive of other aspects of life?"[267] This was a relevant question because research seemed to show that authoritarian measures might provide an effective means of controlling prejudice.

Rose observed that as "democrats in a country which has at least the ideal of democracy," advocates of equality "do not like to think of using non-democratic methods to achieve our goals."[268] Yet, in Rose's opinion, objectivity demanded consideration of all available approaches. Three particular sets of studies showed the efficacy of what Rose called the "authoritative method." According to the first study, performed by the U.S. Army, American soldiers who were compelled to serve alongside African American soldiers in combat in France in 1945 demonstrated less prejudice than their counterparts who had not shared that integrated experience.[269] A comparable study of 400 seamen in the U.S. Merchant Marine produced similar results.[270] Another study showed that race relations in a Kansas City school parish proved to be amicable after the Catholic Bishop ordered its desegregation against the wishes of white parents.[271] Still another study, which involved racially integrated housing projects, reported a reduction in racial animosity among individuals, including those with overtly racist views, after living together in an integrated community.[272] These studies demonstrated the capacity of authoritarian institutions in

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266 He observes that in the absence of congressional support, President Franklin D. Roosevelt established a Fair Employment Practices Commission by Executive Order 8802 on 25 June 1941 in response to A. Philip Randolph's threat to organize a massive march on Washington to protest racial discrimination in the war industries, see Rose, *Race prejudice and discrimination*, 550.

267 Rose, *Race prejudice and discrimination*,, 550.

268 Rose, *Race prejudice and discrimination*, 546.

269 See President's Committee on Civil Rights, *To Secure These Rights*, 83. The Committee's report cites Report No. ETO-82 of the Research Branch, Information and Education Division, in the European Theater of operations of the Army.

270 See Ira N. Brophy, *Public Opinion Quarterly* (winter, 1945-46).

271 Rose, *Race Prejudice and discrimination*, 456.

272 See Morton Deutsch and Mary Evans Collins, "Intergroup Relations in Interracial Public Housing: Occupancy Patterns and Racial Attitudes," *Journal of Housing* 7 (April, 1950): 127-34.

American culture, such as the military and the Catholic Church, to reduce prejudice by compelling individuals of different races to work and live in close proximity to one another.[273] They were frequently cited within the growing antidiscrimination literature, as well as within government reports, such as *To Secure These Rights*.[274]

Rose also looked to the Soviet Union, with its self-professed record of social harmony, for insights into the management of interracial relations. Empirically, however, Rose found the evidence in support of the Soviet model inconclusive. Moreover, the Soviet experience could not apply to the U.S., he reasoned, because in contrast to the Russian people, Americans have an "independent spirit." Even if the Soviet model were effective, Americans would prefer to "take the longer route" and keep their "present liberties."[275] Nevertheless, it was recognized that the "strong arm of the government" would need to be employed in order to address individuals' acts of racial discrimination and injustice.[276] Scholars also recognized that in a liberal polity the extension of the sovereign's coercive power into new areas of private life would require an intellectual justification. Throughout much of the academic and popular literature of the period, therefore, we see individuals articulating supportive normative arguments for precisely this position.

Two main types of normative arguments were developed in support of a stronger state effort to eliminate discrimination. First, supporters of antidiscrimination laws advanced a more capacious conception of democracy, one which not only required democratic political institutions but which also required the democratization of social relations and the construction of democratic citizens. Second, they appropriated ideas from the reform liberalism that had been developed by political thinkers such as John Stuart Mill, T.H. Green,

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273 Rose, *Race Prejudice and discrimination*, 546-48.

274 President's Committee on Civil Rights, *To Secure These Rights*, 82-87.

275 Rose, *Race Prejudice and discrimination*, 456.

276 President's Committee on Civil Rights, *To Secure These Rights*, 133

L.T. Hobhouse, and John Dewey to support the emergence of the welfare state. Proponents of antidiscrimination laws invoked a positive conception of liberty, in which the state is assigned an activist role vis-à-vis society, as opposed to the negative conception of liberty associated with classical liberalism, in which the state is assigned a more passive "night watchman" role.

With the end of World War II, progressives believed that the time was ripe to complete the "unfinished business of democracy."[277] But, what exactly was that business? Answering this question framed the politics of the period. In a period of flux, the language that we use to describe the world often requires redefinition in order to accommodate new realities. Political actors bent on change seek to redefine concepts in order to legitimate their preferred reforms. In the introduction to the Report of the President's Committee on Civil Rights, Charles E. Wilson, the Committee's Chairman and President of General Electric, observed that the world in 1947 was "confused by differing and often contradictory uses of the language in which free men express their ideals."[278] The Committee's report can be read as an effort to redefine the meaning of civil rights and support a more interventionist role for the federal government in protecting those rights. It asserted that the term "civil rights" had been a malleable one in American history: "The phrase, 'civil rights,' is an abbreviation for a whole complex of relationships among individuals and among groups."[279]

Among the four basic rights identified by the Committee was "the right to equality of opportunity."[280] That right encompassed the right to employment, the right to an education—which included both public and private institutions—the right to housing, the

277 Those words are taken from a special publication by Survey Graphic, a progressive periodical published during the 1940s that advocated racial equality and antidiscrimination laws. See *Survey Graphic*, *Color: The Unfinished Business of Democracy: Negroes, U.S.A. The new world, the old world* (New York: Survey Associates, Inc., 1942).

278 President's Committee on Civil Rights, *To Secure These Rights*, iii.

279 President's Committee on Civil Rights, *To Secure These Rights*, x, 13.

280 President's Committee on Civil Rights, *To Secure These Rights*, 9.

right to health service, and the right to public services and accommodations.[281] The Committee asserted that "many privately-owned and operated enterprises should recognize a responsibility to sell to all who wish to buy their services." It continued:

> The Committee is not convinced that an end to segregation in education or in the enjoyment of public services essential to people in a modern society would mean an intrusion upon the private life of the individual. In a democracy, each individual must have freedom to choose his friends and to control the pattern of his personal and family life, [b]ut we see nothing inconsistent between this freedom and a recognition of the truth that democracy also means that in going to school, working, participating in the political process, serving in the armed forces, enjoying government services in such fields as health and recreation, making use of transportation and other public accommodation facilities, and in living in specific communities and neighborhoods, distinctions of race, color, and creed have no place.[282]

In an address delivered at the Lincoln Memorial in June 1947, President Harry S. Truman said that "[w]e must keep moving forward, with new concepts of civil rights to safeguard our heritage. The extension of civil rights today means not protection of the people against government, but protection of the people by the Government."[283] To this the Civil Rights Committee added that America needed "more than protection of our rights against government;" America needed "protection of our rights against private persons or groups, seeking to undermine them."[284] Also in 1947, Robert K. Carr asked whether "it is desirable that government cease to be regarded as the chief oppressor of civil liberty and be made to play the role of chief protector."[285] Carr, who served as the Executive Director to the President's Committee on Civil Rights, argued that "[w]e must continue to build and improve a social order conducive to freedom."[286] He asked, "what shall be done to protect civil liberty against the man who does not yet understand, or against the man who refuses to

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281 President's Committee on Civil Rights, *To Secure These Rights*, 53-79

282 President's Committee on Civil Rights, *To Secure These Rights*, 74, 87

283 Quoted in President's Committee on Civil Rights, *To Secure These Rights*, 99.

284 President's Committee on Civil Rights, *To Secure These Rights*, 99.

285 Robert K. Carr, *Federal Protection of Civil Rights: quest for a sword* (Ithaca, N.Y., Cornell Univ. Press, 1947), 192-93.

286 Carr, *Federal Protection of Civil Rights*, 191-92.

understand or is incapable of understanding?"[287] Carr asserted that "the Civil Rights Section is a partial answer … until the day when long-term and intermediate efforts at improvement will have removed some if not all of these threats."[288]

This stance required not only the extension of full political equality to all citizens, but also the democratization of all areas of life. Petegorsky, a union organizer, for example, argued that in "each area of our social life where democracy is incomplete, we must extend and then safeguard it."[289] A Canadian law professor Frank Scott likewise argued that "[d]emocracy contains a full doctrine of social responsibility, placing on the individual the obligation of caring for the freedom, security and well-being of others."[290]

This was not, however, simply a matter of social justice; rather, the psychological model of human behavior implied that antidiscrimination laws were imperative for the survival of democratic government itself. Democracy, it was claimed, requires democratic citizens. For example, according to Allport:

> Democracy, we now realize, places a heavy burden upon the personality, sometimes too great to bear. The maturely democratic person must possess subtle virtues and capacities: an ability to think rationally about causes and effects, an ability to form properly differentiated categories in respect to ethnic groups and their traits, a willingness to award freedom to others, …. All these qualities are difficult to achieve and maintain. It is easier to succumb to oversimplification and dogmatism, to repudiate the ambiguities inherent in a democratic society, to demand definiteness, to 'escape from freedom.'[291]

One might counter, what if existing voters do not wish to bear that heavy burden; what if they refuse to support antidiscrimination laws, preferring, instead, their rights to property and freedom of association? Rose responded that if a law conforms with democratic ideals, as he believed antidiscrimination laws did, then "its passage and enforcement might not be considered as a deprivation of the rights of the individual who was opposed to the law

287 Carr, *Federal Protection of Civil Rights*, 192.
288 Carr, *Federal Protection of Civil Rights,* 192.
289 Petegorsky, 539.
290 Scott, 43-44.
291 Allport, *The Nature of Prejudice*, 515.

before its passage, but rather as a means of bringing him in closer conformity with his ideals."[292]

Proponents of reform recognized that they were doing nothing short of reconfiguring liberty. Walter G. Muelder, for example, recognized that balancing competing conceptions of liberty poses a key problem for democracies. He asserted that "[i]berty is not the mere absence of restraint," but rather that "every liberty involves some restraint on someone and in some regard."[293] Similarly, the President's Committee on Civil Rights argued that a new conception of freedom, beyond the negative conception set forth in the Bill of Rights, was warranted. It articulated a relational freedom in which a man has a right to manage his own affairs as he sees fit up to the point where what he does interferes with the equal rights of others in the community to manage their affairs—or up to the point where he begins to injure the welfare of the whole group.[294] This "new version of liberalism imposed on those who enjoy liberty an obligation to enlightenment, or self-realization, or affirmation of respect for the dignity of others."[295] Daniel Hill, Director of the Ontario Human Rights Commission, asserted that modern antidiscrimination legislation is "predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people."[296] Walter Tarnopolsky argued that discriminators should be "given an opportunity to re-assess their attitudes, and to reform themselves," after being shown the damage caused by their actions.[297] He recognized, however, that antidiscrimination laws "cannot eliminate

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292 1951: 555.
293 1946: 13.
294 President's Committee on Civil Rights, *To Secure These Rights*, 5.
295 Rosenblum 1989: 6.
296 1965: 4.
297 Tarnopolsky, "The Iron Hand in the Velvet Glove," 573.

bigotry and prejudice," but they can end discrimination, the public manifestation of those sentiments.[298]

These new conceptions of democracy and liberalism were embedded in a rhetoric of enlightenment and modernization. Frederick Douglass had a hundred years earlier condemned the Civil Rights Cases as "'a blow … struck against human progress.'"[299] Myrdal, adapted Franz Alexander's idea that racial prejudice was a "cultural lag" from a pre-industrial era.[300] Prejudice was regarded as "unenlightened."[301] In the 1960s, the worry was "culturally distorted" citizens.[302] Thousand's of miles away, New Zealand's Secretary of Justice, J.L. Robson, who was instrumental in that country's first antidiscrimination law, later observed that both racial prejudice and ignorance had to be surmounted. He suggested that the objective must be to "spread enlightenment."[303]

In its final report, a Notre Dame Conference on Civil Rights Legislation explicitly rationalized a more activist federal government. In the past, which it characterized as "simpler days of industrial adolescence, abundant land, and scarce people," society was able to regulate its ordering and a passive government was appropriate. By contrast, the complicated society of the 1960s required a "modern" activist government. Morroe Berger asserted that "the relationship of employer to worker" had become "devoid of personal sentiment under present conditions of large commercial and manufacturing enterprises,"

298 Tarnopolsky, "The Iron Hand in the Velvet Glove," 576.
299 Quoted in McPherson 1965: 510.
300 Myrdal, *An American Dilemma.*
301 MacIver 1945: 6.
302 Notre Dame Conference on Congressional Civil Rights Legislation 1963: 438.
303 Robson 1971: v.

thus rendering it a purely "economic tie" and "a fit subject for legal control."[304] The idea was, in short, that enlightenment and modernity require action against discrimination.[305]

THE POST-WORLD WAR II WAVE OF ANTIDISCRIMINATION LAWMAKING IN THE U.S., CANADA, AND BRITAIN

In the decades after World War II, several factors combined to place race relations and civil rights squarely on the political agenda. Sonya O. Rose suggests that "[w]ar exaggerates the significance of the nation as a source and object of identity," and provides elites with opportunities to "focus public attention on questions such as who 'we' are and what it is that 'we' stand for."[306] Between February 1942 and August 1946, eight major race riots had erupted across the U.S. Except for the riot in Los Angeles, which involved whites and Latinos, the riots involved clashes between blacks and whites. The Detroit riot, in June 1943, resulted in 34 deaths, 461 injuries, and the U.S. army's occupation of the city. Lying behind the riots was the wartime expansion of defense manufacturing and the creation of many new jobs in cities like Detroit. As one labor leader asserted at the time, "'[o]rganized labor has been called upon to make many sacrifices for defense and has made them gladly, but this [admission of blacks] is asking too much.'"[307] However, defense needs, combined with increasing pressure from civil rights leaders, motivated governments to act.[308]

The initial twentieth century battles over civil rights were waged in the U.S. at the state level. Arguments about conflicting rights—rights to contract, property, and freedom of

304 Morroe Berger, *Equality by Statute: legal controls over group discrimination* (New York: Columbia University Press, 1952), 168-69.

305 "Racial discrimination has no place in modern Britain." Report submitted by the United Kingdom pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, 26 July 1999 (ACFC/SR(1999)013).

306 Sonya O. Rose, "Sex, Citizenship, and the Nation in World War II Britain," The American Historical Review, 103(October, 1998): 1147-1176.1148.

307 Union leader quoted in Michael Sovern, *Legal restraints on racial discrimination in employment* (New York: Twentieth Century Fund, 1966), 10.

308 Krauss 1986: 5.

association—were hashed out during legislative debates and in a small number of court cases. These state-level politics are largely ignored by contemporary students of civil rights,309 who tend instead to focus on the more dramatic developments at the federal level during the 1960s. Whereas earlier antidiscrimination laws had been limited to discrimination that occurred in places defined as public in nature, such as theaters and barber shops, by the 1940s, state-level reformers were training their sights on the more contentious issues of employment and housing discrimination (see Table 3.2). Legislation prohibiting such discrimination, however, was considered a novel idea.[310]

Table 3.2: State Laws Prohibiting Discrimination in Public Accommodations, 1945 to 1961

1953	**1955**	**1957**	**1959**	**1961**
OR	MT	VT	ME	ID
	NM			ND
				WY

The state of New York, a pioneer in this regard, merits close attention. In 1909, it enacted a series of laws directed against employment discrimination on grounds of race in a limited number of areas, including the practice of law,[311] state employment in 1918,[312] employment by utility companies in 1933,[313] and all public works contracts in 1935.[314] In addition, a 1932 New York law prohibited inquires about the religious affiliation of

309 This was not, however, always the case. State laws prohibiting discrimination have served as the subject of a number of books, including Leon H. Mayhew, Law and Equal Opportunity: A Study of the Massachusetts Commission against Discrimination (Cambridge, Mass.: Harvard University Press, 1968), see 75-101 for a discussion of the politics surrounding the passage of Massachusetts postwar statutes.
310 See Paul Burstein, *Discrimination, Jobs, and Politics: the struggle for equal employment opportunity in the United States since the New Deal* (Chicago: University of Chicago Press, 1985), 19.
311 Judiciary Law §460.
312 Penal Law §514.
313 Civil Rights Law §42.
314 Labor Law§220-e.

individuals seeking employment in public education.[315] And in 1938, upon the recommendation of the New York Constitutional Convention, voters approved insertion into the state constitution new language guaranteeing equal protection of the laws.[316] Specifically, this language stated that "[n]o person shall, because of his race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution," as well as by agencies acting on behalf of the state.[317] That language, however, was not self-executing,[318] and between 1939 and 1943, a number of laws were enacted to give it effect. These laws prohibited discrimination in public housing,[319] in public relief and public work projects,[320] and in the sale or delivery of alcoholic beverages,[321] as well as by labor organizations[322] and firms engaged in defense work.[323] In addition, a 1941 statute made it a misdemeanor to violate Article 1, §11 of the New York State Constitution.[324]

Also in 1941, New York Governor Herbert H. Lehman appointed a Committee on Discrimination in Employment to investigate and conciliate discriminatory practices in the war industries,[325] and three years later Governor Thomas E. Dewey established the New York State Temporary Commission against Discrimination, which conducted public hearings around the state and issued a major report in January 1945. In an atmosphere "charged with uncertainty, fear and hostility,"[326] the Commission's recommendations were embodied in the

315 Civil Rights Law §40-a.
316 Konvitz and Leskes, *A Century of Civil Rights*, 197.
317 Art. I, §11.
318 In other words, it remained inoperative until implemented through legislative enactment.
319 Public Housing Law §223 (1939).
320 Penal Law §772-a (1940).
321 Alcoholic Beverages Control Law §65 (1943).
322 Civil Rights Law §43 (1940).
323 Civil Rights Law §44; Penal Law §514 (1941).
324 Penal Law §§700, 701.
325 In nearly three years of operation, it processed over one thousand cases, settling ninety-five percent primarily through conciliation and persuasion (Krauss 1986: 6).
326 Girard and Jaffe 1964: 114.

Ives-Quinn Bill, which was subsequently enacted by the legislature as the Law Against Discrimination that same year.[327] Business associations, among them the New York Chamber of Commerce, the Board of Trade, and the Real Estate Board, opposed the legislation,[328] as did Nation publisher and cofounder of the National Association for the Advancement of Colored People (NAACP), Oswald Garrison Villard, who argued in favor of freedom of association and preferred a voluntarist approach to one of legal compulsion. A number of civil rights groups, including the American Jewish Congress (AJC) played an important role in the law's enactment, and they continued to play a key role later with respect to its enforcement.[329] In May 1948, the AJC established a Committee to Support the Ives-Quinn Law.

In the text of the New York law the legislature expressly pronounced discrimination on grounds of race, creed, color or national origin to be a matter of state concern, asserting that such discrimination "threatens not only the rights and proper privileges of [state residents]" but it also "menaces the institutions and foundation of a free democratic society."[330] Presciently, the Young Men's Christian Association published a booklet summarizing the debates, in which it expressed its conviction that "the story of this record holds a profound meaning for our time, far beyond the statutes themselves or beyond the borders of New York State."[331]

Moreover, the Law Against Discrimination created the New York State Commission against Discrimination, the first such state antidiscrimination agency, and other states then followed New York's lead (Table 3.3). By 1960, seventeen states had enacted laws that

327 Laws of 1945, ch. 118.
328 See Berger 1967, 181-82
329 Krauss 1986: 15.
330 New York Law Against Discrimination in Employment, Article 12, §125.
331 Young Men's Christian Association, 4.

prohibited discrimination, typically on grounds of race, color, or religion,[332] and that empowered state agencies to enforce them. In addition, Indiana and Kansas enacted fair employment practices laws in 1945 and 1953, respectively, although neither had provided for state enforcement by 1960. State commissions were generally empowered to investigate complaints, conduct hearings, conciliate, issue cease-and-desist orders, and ultimately, to seek court enforcement of their orders.

Table 3.3: State Laws Prohibiting Discrimination in Employment and Providing for State Enforcement[333]

1945	**1946**	**1947**	**1949**	**1955**	**1957**	**1959**	**1960**
NY	MA	CT	NM	MI	WI[334]	CA	DE
NJ			OR	MN	CO[335]	OH	
			RI	PA		AL[336]	
			WA				

Housing discrimination was the last major area of life in which discrimination was prohibited by the states. In 1949, Connecticut amended its public accommodations statute to prohibit discrimination on grounds of race, color, or religion in public housing, and it empowered that agency charged with enforcing its fair employment practices law, the Civil Rights Commission, to enforce the law. In 1949, New Jersey made another innovation by extending the jurisdiction of its enforcement agency to cover preventing discrimination in

332 Eight of these states included age as a protected ground. New Jersey also recognized military service as a protected ground.

333 Table complied from information from Konvitz and Leskes, *A Century of Civil Rights*, 201-202.

334 Wisconsin had enacted a fair employment practices law in 1945, but it did not empower a state agency to issue cease-and-desist orders until 1957.

335 Colorado had enacted a fair employment practices statute in 1951, but did not empower an agency to enforce it until 1957.

336 Alaska entered the Union as a state in 1959. It had enacted an fair employment practices law and empowered an agency to enforce it in 1951.

places of public accommodations.[337] Other states quickly followed suit: Connecticut (1949); Massachusetts (1950); New York and Rhode Island (1952); Colorado, Oregon, and Washington (1957); and Pennsylvania (1961).

The federal government enacted civil rights laws in 1957 and 1960, but those laws primarily addressed voting rights and did not attempt to recognize a new set of federal rights to nondiscrimination in employment, public accommodations, or housing.[338] By 1963, however, the political context had changed significantly. The U.S. government faced increasing scrutiny by newly independent Third World countries and the Soviet Union,[339] and grassroots protests and demonstrations had shifted the Civil Rights Movement into full swing.[340] In the immediate wake of police brutalities committed against protestors in Birmingham, Alabama, President John F. Kennedy threw his support behind federal civil rights legislation. A political breakthrough came when Republican Senator Everett Dirksen announced his support for legislation. Borrowing a line from Victor Hugo, Dirksen said: "No army is stronger than an idea whose time has come."[341] As president after Kenney's assassination, Lyndon B. Johnson capitalized on this Republican support. The Civil Rights Act of 1964 prohibited both racial and sex discrimination in employment[342] and racial discrimination in public accommodations.[343] In addition, it established a complicated system of enforcement that parceled out responsibilities to an array of federal bureaucracies,

337 Laws of 1945, ch. 169.
338 See Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (Lawrence, Kan.: University Press of Kansas, 1997).
339 See Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, N.J.: Princeton University Press, 2000).
340 On the Civil Rights Movement, see Robert Weisbrot, *Freedom bound: a history of America's civil rights movement* (New York: Plume, 1990).
341 *New York Times*, May 20, 1964, at 1, col. 7 (19 May 1964).
342 Civil Rights Act 1964, Title VII.
343 Civil Rights Act 1964, Title II.

including the Equal Employment Opportunities Commission and the Office of Contract Compliance, as well as to the Attorney General and private parties.[344]

Prior to World War II, with minor exceptions, little antidiscrimination legislation existed in Canada.[345] As in the American case, after the war a wave of antidiscrimination lawmaking ensued.[346] Owing to Canada's federal system, these reforms were first accomplished at the provincial level, which has jurisdiction over civil rights under Canada's constitution.[347] In 1944, Ontario's Conservative government enacted the first piece of modern antidiscrimination legislation, namely the Racial Discrimination Act, which banned the public display of discriminatory signs and notices. Three years later, a Co-operative Commonwealth Federation (CCF) government in Saskatchewan enacted a Bill of Rights Act that protected against discrimination in employment, housing, workplace education, and real estate transactions, in addition to protecting traditional civil liberties. But the Ontario and Saskatchewan laws both employed criminal sanctions, which made their enforcement difficult.[348] In order to tighten enforcement, the provincial elites borrowed from the legislative developments in American states that were reviewed above.

Ontario adopted Canada's first Fair Employment Practices Act in 1951 and its first Fair Accommodation Practices Act in 1954, both of which were modeled on the State of New York's legislation. As Tables 3.4 and 3.5 show, during the 1950s other provinces quickly followed Ontario's lead. The federal government in Ottawa enacted fair employment practices legislation in 1953[349] that applied to federal entities and business

344 See Landsberg, *Enforcing Civil Rights*.
345 In 1932, Ontario amended its insurance legislation to prohibit racial and religious discrimination in the assessment of insurance risk, and British Columbia amended its unemployment insurance relief legislation to ban discrimination on grounds of race, religion, or political affiliation in relief work projects. See Lita-Rose Betcherman, *The Swastika and the Maple Leaf* (Toronto: Fitzhenry & Whiteside, 1975), 50.
346 See Walter S. Tarnopolsky and William Pentney, *Discrimination and the Law* (Toronto: Carswell, 1994).
347 The Constitution Act, 1867, formerly known as the British North American Act.
348 See Walter Tarnopolsky, "The Iron Hand in the Velvet Glove," *Canadian Bar Review* 46 (1968), esp. 569-9.
349 Canada Fair Employment Practices Act S.C. 1952-53, c.19.

sectors under federal jurisdiction, such as inter-provincial transportation and communications. The reforms of the 1940s and 1950s were largely the product of pressure applied by Jewish and African Canadian organizations upon provincial cabinets paired with public relations campaigns that were waged through union locals and church groups.[350] During the 1960s, provinces began to consolidate their diverse fair practices laws into what were typically called human rights codes. In 1961, Ontario again led the way by creating a Human Rights Commission that came to be charged with enforcing a Human Rights Code enacted one year later. By 1977, every Canadian province, as well as the federal government, had established a special commission, called a "Human Rights Commission," to enforce antidiscrimination laws (Table 3.6). In turn, these commissions began to exert influence on antidiscrimination policymaking processes.[351]

Table 3.4: Fair Employment Practices Legislation in Canada, 1951-1964

Year	**Jurisdiction**
1951	Ontario
1953	Manitoba
	Federal
1955	Nova Scotia
1956	New Brunswick
	Saskatchewan
	British Columbia
1963	Yukon Territory
1964	Québec

350 Leon H. Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission against Discrimination* (Cambridge: Harvard University Press, 1968), 75-83; Walker, *"Race," Rights and the Law in the Supreme Court of Canada*, 31; Howe and Johnson, Restraining Equality, 29

351 Cynthia Williams, "The Changing Nature of Citizen Rights" in Alan Cairns and Cynthia Williams (research coordinators), *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press), 99-131. 1985: 107; Howe and Johnson, *Restraining Equality*, 12-36.

Table 3.5: Fair Accommodation Practices Legislation in Canada, 1954-1960

Year	Jurisdiction
1954	Ontario
1956	Saskatchewan
1959	Nova Scotia
	New Brunswick
1960	Manitoba

Table 3.6: Human Rights Codes in Canada, 1962-1987

Year	Jurisdiction
1962	Ontario[352]
1963	Nova Scotia
1966	Alberta
1967	New Brunswick
1968	Prince Edward Island
1969	British Columbia
1970	Manitoba
1975	Québec
1977	Federal
1979	Saskatchewan[353]
1987	Yukon Territory

In contrast to the U.S. and Canada, Britain did not enact antidiscrimination legislation until the mid-1960s, although several MPs proposed such legislation earlier. In 1950 Reginald Sorenson, for example, introduced into Parliament a Colour Bar Bill that would have made it a criminal offense to discriminate on racial grounds in the provision of services and facilities in public places. In addition, the Bill would have criminalized the publication or display of notices or advertisements that indicated a policy of racial

352 Ontario established its Human Rights Commission in 1961, one year before enacting its Human Rights Code.

353 Saskatchewan established its Human Rights Commission in 1972, seven years before enacting its Human Rights Code.

discrimination. Sorenson's Bill was never debated in the House of Commons, however. Six years later, Fenner Brockway introduced a Racial Discrimination Bill that not only would have prohibited racial and religious discrimination in public places but also discrimination by large employers. It, too, failed to come to a vote. Nevertheless, Brockway subsequently introduced eight similar bills, although, as a consequence of trade union opposition, he omitted any reference to employment discrimination in those bills.

It was not until the early 1960s that broader political support for antidiscrimination legislation developed. A group of lawyers in the Labour Party examined the North American experience with antidiscrimination law for lessons in how to deal with Britain's emerging racial problems. The Race Relations Act was enacted in 1965, which prohibited discrimination in public accommodations. The 1965 Act was followed by the Race Relations Act of 1968, which expanded prohibition of discrimination in employment and housing. However, both laws prescribed a conciliatory approach to enforcement, allowing the courts to be used only as a last resort. In 1975, the Sex Discrimination Act was passed. It eliminated mandatory conciliation and provided for immediate adjudication of claims in preexisting industrial tribunals or county courts. One year later, a new Race Relations Act was passed that incorporated the Sex Discrimination Act's enforcement measures. The British antidiscrimination regime has since served as a model for European Union efforts.

THE UNITED NATIONS

Almost from its inception, the UN was a key disseminator of antidiscrimination ideology. Two factors contributed to this UN role. First, in lieu of creating strong UN bodies capable of enforcing UN measures, member states elected to create a number of advisory bodies that were charged with sponsoring research, collecting data from member states, and organizing conferences at which research findings and cross-national data could

be examined and discussed. Second, as a result of decolonization, the size and tenor of the UN's membership changed. During the 1960s alone, thirty-two new African states, five new Asian states, and five new Latin American states were admitted to the UN. For the newly independent African and Asian nations, race and racial discrimination were preeminent international issues.[354] These new member states exploited their superior numbers to require UN advisory bodies, against the opposition of Western member countries, to sponsor research and organize conferences about race and racial discrimination.[355] Furthermore, they initiated efforts to draft UN declarations and conventions that obligated signatories to commit to ideas of racial equality and undertake legal reforms to combat racial discrimination. Once these measures were taken with regard to race, other groups sought similar UN and international measures against additional forms of discrimination.

It is worth noting that the word "discrimination" appears in neither the UN Charter nor the UDHR. In 1949, however, the UN Secretary-General commissioned a memorandum entitled *The Main Types and Causes of Discrimination*.[356] Its purpose was to explain a concept that was still unfamiliar to most member states' citizenries. Drawing upon intellectual developments in the U.S., the memorandum espoused the idea that prejudice and discrimination were caused by environmental influences, and it endorsed three types of antidiscrimination measures: 1) direct legal action; 2) administrative measures enforced through public agencies; and 3) educational action.[357] The memorandum acknowledged the tension between eliminating discrimination and protecting liberties, and it observed that individuals cannot be "forced to sympathize" and that "any attempt to influence ideas or

354 See Paul Gordon Lauren, Power and Prejudice: *The Politics and Diplomacy of Racial Discrimination* (Boulder, Col.: Westview Press, 1988), 197-232
355 See Lauren, Power and Prejudice: The Politics and Diplomacy of Racial Discrimination, 225-26.
356 (E/CN.4/Sub.2/40/Rev.1, 7 June 1949).
357 1949: 7, ¶25

sentiments by coercive measures would constitute a violation of [freedom of thought and opinion], which are also recognized human rights" (1949: 40-41, ¶133).

Under UN auspices, social and other scientists were convened on a number of occasions to issue pronouncements on race. In 1950, the UN Educational, Scientific and Cultural Organization (UNESCO) assembled an international committee of eight experts—including E. Franklin Frazier and Ashley Montagu, both of whom had collaborated with Myrdal on *An American Dilemma*—for the purpose of producing a an official statement on the issue of race. UNESCO published a "Statement on the Nature of Race and Race Differences" one year later, along with other related materials, in a booklet entitled *The Concept of Race*. In 1964, it issued another such statement, this one entitled "The Race Question in Modern Science," and it commissioned a number of studies that explored various issues pertaining to race that appeared in a series of books devoted to "The Race Question in Modern Science." In 1955, UNESCO organized a Conference on the Eradication of Prejudice and Discrimination in Geneva, and it drafted a Convention Against Discrimination in Education in 1962. Five years later, UNESCO convened a committee of experts as part of its program to "disseminate scientific facts about race and to combat racial prejudice."[358] This committee espoused the idea that law is among the most important means of ensuring equality between individuals and fighting racism, and it advocated national legislation as a means of effectively redressing racial discrimination. Although the effects of such legislation might not be immediate, the committee reasoned, such laws would set a moral example backed by the dignity of the courts that could, in the long run, change attitudes. Governmental intervention was, therefore, essential.[359]

358 Racial Discrimination: 1971 International Year for Action to Combat Racism and Racial Discrimination (New York: United Nations Office of Public Information, 1971), pp. 16 (UNOPI 2/R11/2).

359 Michael Banton, 1971: 10.

In 1965, the UNGA unanimously adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It obligated signatories to enact national antidiscrimination legislation. According to Egon Schwelb, the ICERD represented "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races."[360] The ICERD entered into force, upon receiving the requisite number of signatures, on January 4, 1969. Later that year, the UNGA designated 1971 as the International Year for Action to Combat Racism and Racial Discrimination. This initiative arose, in part, from a proposal made at the International Conference on Human Rights, held in Tehran in 1968. Later, 1973 was designated the beginning of a Decade for Action to Combat Racism and Racial Discrimination.

The UN and its bodies took comparable actions on behalf of women and the disabled. After its creation in 1946, the Commission on the Status of Women (CSW) worked to define and elaborate general guarantees of non-discrimination against women. Between 1949 and 1959, the CSW elaborated a Convention on the Political Rights of Women, which was adopted by the UNGA in 1952. Subsequently, the Convention on the Nationality of Married Women was adopted by the UNGA in 1957; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage was adopted by the UNGA in 1962; and the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was adopted by the UNGA in 1965. Those efforts were followed by the Declaration on the Elimination of Discrimination against Women, which was ultimately adopted by the UNGA in 1967. 1975 was proclaimed International Women's Year and a world conference on women's issues was held that year in Mexico City. Delegates to the conference called for a convention on the elimination of all forms of discrimination against women. Consequently, in 1979 the UNGA adopted the

[360] Schwelb 1966: 1057

International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and this entered into force in 1981, faster than any previous human rights convention had done

In 1971, the UN adopted the Declaration of the Rights of Mentally Retarded Persons,[361] and in 1975, it adopted the Declaration on the Rights of Disabled Persons.[362] The year 1981 was proclaimed International Year of the Disabled Person, and it was followed by the World Program of Action Concerning Disabled Persons in 1982 and the International Decade of Disabled Persons, which began in 1983. More recently, in 1993, the UN adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, and these rules actually constitute a convention on the rights of people with a disability. In December 2001, the UNGA decided to consider proposals for a comprehensive and integral convention to promote and protect the rights and dignity of people with disabilities; at present, however, such a convention remains an unmet demand of nongovernmental organizations representing the interests of disabled persons.

CONCLUSION

As this chapter has shown, antidiscrimination legislation has a long history. Once the province of state and provincial legislatures in the U.S. and Canada, today discrimination serves as the target of numerous international instruments. Its diffusion rested upon a particular set of ideas about the malleability of human relations, the efficacy of law, and the requisites of democracy. However, as this chapter has also amply demonstrated, the path followed by antidiscrimination legislation in the U.S., Canada, and Britain was a winding one, in which political circumstances and calculations played key roles. It is important to

361 G.A.Res. 2856 26 U.N. G.A.O.R. Supp. (No. 29), 99 U.N. Doc. A/8429 (1971).
362 G.A. Res. 3447, 30 U.N. G.A.O.R. Supp. (No. 34192, U.N. Doc. A/10034 (1975).

comprehend the varying ways in which antidiscrimination regimes came to be erected. Close scrutiny of how ideology, conceptions of the law, and democratic politics conjoined in two other Anglo-American democracies, New Zealand and Australia, to create such regimes are illuminating, and the next two chapters undertake this scrutiny.

Chapter Four: New Zealand

New Zealand's antidiscrimination regime today protects against discrimination on thirteen grounds. Color, race, ethnic, and national origins were the first grounds of discrimination singled out for protection in the Race Relations Act 1971. Six years later, the Human Rights Commission Act was passed, recognizing additional protected grounds—sex, marital status, and religious and ethical belief. The Race Relations Act was amended in 1984 to extend the definition of ethnic and national origin to include nationality and citizenship. In 1992, age was added to the list of protected grounds, but only within the context of employment.[363] The following year, New Zealand's antidiscrimination law underwent a major reform. The Human Rights Commission Act was supplanted by the Human Rights Act 1993, which recognized five additional protected grounds—disability, employment status, family status, and political opinion. In addition, the scope of the prohibition against age discrimination was extended beyond the context of employment to include all areas covered by the Act.[364]

Important changes also occurred with regard to enforcement structure. The Race Relations Act 1971 authorized the creation of an Office of the Race Relations Conciliator, the main tasks of which were conciliation and education. Litigation was intended to occur only as a last resort. As a result, the courts did not have occasion to consider a case under the Act until 1977, and that case involved a conviction under the controversial provision that

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363 Human Rights Commission Amendment Act 1992. The Act also applied to several areas closely related to employment, namely partnerships, industrial unions and professional and trade associations, qualifying bodies, and vocational training bodies, §§8-11.

364 These include access to public places, vehicles and facilities, education, employment , industrial and professional associations, qualifying bodies and vocational training bodies, partnerships, provision of goods and services, and land, housing and accommodation.

established "inciting racial disharmony" as a criminal offense.[365] With the Human Rights Commission Act in 1977, two new institutions were established: 1) the Human Rights Commission (HRC), which was charged with enforcing the new law, and 2) the Equal Opportunities Tribunal (EOT), an ad hoc, quasi-judicial body charged with resolving complaints where conciliation, by either the Race Relations Conciliator or the HRC had failed. In 1984, the Human Rights Commission Act was amended to increase the amount of damages available, and the post of Proceedings Commissioner was created. The Proceedings Commissioner possessed the institutional authority and autonomy, separate from the HRC, to provide legal representation to complainants before the EOT and the courts. With the Human Rights Act 1993, the Proceedings Commissioner was reconceived as the Director of Human Rights Proceedings, and the role of strategic litigation was expressly codified. In addition, the EOT was replaced with a Complaints Review Tribunal (CRT). Finally, the Office of the Race Relations Conciliator was merged in 2001 with the HRC, thereby centralizing the antidiscrimination enforcement power in a single institution.

The New Zealand case presents several puzzles. First, considering the transnational developments set forth in Chapter Three, why was there no antidiscrimination legislation until 1971? Various domestic groups were aware of discriminatory treatment and brought their concerns before government, and the bureaucracy was fielding developments internationally. A second puzzle concerns the political orientation of the party responsible for both creating New Zealand's antidiscrimination regime and expanding it, namely the traditionally conservative National Party. Why were all three of the country's major pieces of antidiscrimination legislation enacted on its watch?

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[365] See Race Relation Act 1971, §25. King-Ansell was convicted in the Magistrate's Court and his conviction was upheld by the Supreme Court. Relying on the medieval use of the word "ethnic," in the Court of Appeal, he argued that Jews were not a group having "ethnic origins." On 14 December 1979, the Court, however, flatly rejected that argument, concluding that it did not serve the interests of the law.

DISCRIMINATION IN POSTWAR NEW ZEALAND: 1945-1970

Writing in 1971, Kenneth J. Keith, who in 2004 became a justice on the newly established New Zealand Supreme Court, wrote an article about the Race Relations Bill 1971. He began with this: "Should the law impose restraints … on the freedom of the individual—land owner or landlord, banker or insurer, employer or trade union official—not to enter into a contract or to exercise some other legal power if the reason for his refusal is racial prejudice?"[366] Keith did not dwell on this question, observing that "it appears to be generally accepted both in New Zealand and abroad that such laws are called for."[367] Instead, he considered the form that an antidiscrimination law should take and the manner by which it should be enforced.

The absence of antidiscrimination laws from New Zealand's immediate postwar political agenda is curious for three main reasons. First, the enactment and professional discussion of antidiscrimination laws was a highly salient topic within UN bodies, across North America, and even at "home" in Great Britain. Between 1945 and 1970, antidiscrimination statutes had been enacted by every Canadian province, by many American states, as well as by the federal government, by the state of South Australia, and by Great Britain.[368] During the 1950s, New Zealand's Department of External Affairs received several UN requests to participate in seminars and conferences concerning legislation against discrimination.[369] In 1966, the UN General Assembly (UNGA) opened the International

366 Keith 1971: 57.

367 1971: 57.

368 See Chapter Three, infra.

369 For example, in 1956, the UN Secretary-General contacted the New Zealand government on behalf of the UN Commission on Human Rights to inquire about its interest in hosting a seminar on one of three topics, one of which pertained to "techniques for preventing and combating racial discrimination." New Zealand officials opted, instead, to participate in a seminar on the "protection of human rights in the administration of

Convention on the Elimination of All Forms of Racial Discrimination (ICERD) for signature by Member States.[370] New Zealand signed the ICERD on 25 October 1966, but it postponed ratifying the instrument for five years. Ratification required transposing the terms of the Convention into domestic law. In January 1969, the ICERD entered into force upon obtaining the requisite number of signatures from member states.

Second, during this long period, New Zealand society underwent significant demographic changes. The Maori population dramatically expanded and many Maori moved from rural areas to regional towns and cities. Maori increased by 9% from 1926 to 1951, and in the first half of the 1950s they increased by 24%.[371] Between 1945 and 1966, the Maori population more than doubled, from 115,646 to 249,236.[372] Moreover, in 1960, 96% of all Maori lived in the North Island, with as many as 73% living in the Auckland Province.[373] In 1956, only one-fifth of persons of Maori descent lived in urban areas, compared to 40% ten years later.[374] Maori migration to the cities was fueled by loss of land, declines in rural employment, policies that provided loans for urban housing, and job training programs in the cities. During this same period, New Zealand's Pacific Islander populations continued to grow, due primarily to heavy immigration. Between 1956 and 1966, the number of Pacific Islanders rose from approximately 8,000 to 26,000.[375] These changes brought an unprecedented level of daily contact between New Zealand's racial minorities and *Pakeha*—

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justice." MA 19/1/539 "Advisory Services in the Field of Human Rights" Memo from Director of Education, C.E. Beeby to the Secretary for Maori Affairs. They concurred that the first would be of interest.

370 The ICERD was adopted by the General Assembly of the United Nations in resolution 2106 (XX) 2 of 21 December 1965.

371 See J.K. Hunn, *Report on Department of Maori Affairs with Statistical Supplement* (Wellington: R.E. Owen, Government Printer, 1961), 19 [hereafter *The Hunn Report*].

372 See *2001 Census: Maori (2001) – Reference Reports*, "Table 1: Maori Population Summary, 1858-2001" available at http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Reference+Reports+2001+Census:+Maori+2001 accessed on 3 August 2004.

373 *The Hunn Report*, 8.

374 Colgan 1972: 21.

375 Colgan 1972: 28.

white New Zealanders. Maori often lacked the requisite skills for urban employment, and both they and Pacific Islanders faced discrimination by employers. Some government officials recognized that these new demographic trends threatened to produce the types of social problems typically associated with an urbanizing but economically disadvantaged minority group.[376] Attorney-General and Minister for Justice Josiah Ralph Hanan worried that the changes would create social strains, racial tension, and potentially social conflict.[377]

Third, by the late 1950s, New Zealand's government was encountering the new salience of race as an international issue. New Zealand had enjoyed an international reputation for racial tolerance,[378] a reputation that the political elite were eager to sustain. This reputation was threatened by a series of controversies surrounding South African rugby tours and by nongovernmental organizations (NGOs) that took instances of local racial discrimination to UN bodies. In 1948 and again in 1959, South Africa had invited the All Blacks, New Zealand's national rugby team, to tour the country and engage its national team, the Springboks, in a series of matches. Public controversy erupted on both occasions, placing the issue of racial discrimination front and center.[379] In 1950, New Zealand's Permanent Delegation to the UN in New York received "charges of discrimination against Maoris" in employment and living standards that had been filed by the World Federation of Trade Unions (WFTU) with the UN's Economic and Social Council.[380] Eight years later, a New Zealand representative to the Special Political Committee of the UN stated, "in precept, in practice, and in fact, all New Zealand's people enjoy equally, full political,

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376 Harré 1964: 10.

377 1968: 193; Hazlehurst 1993: 12. For references by Government Ministers to "the problems associated with having large segments of its population coming from different racial origins," see New Zealand *Hansard*, v. 363, 23 September 1969, pp. 2958-2960. For examples of debates over New Zealand's racially discriminatory immigrations policies, see 369 *Hansard* pp. 3602-3607.

378 Thompson 1961: 29.

379 "Decision Reaffirmed: Exclusion of Maoris from N.Z. Rugby Team for South Africa," *Southern Cross* (2 October 1948).

380 MA 36 1/21 Inward Telegram, 26 January 1950.

economic, social and civil rights. We could never contemplate a departure from these conditions."[381] New Zealand was also sensitive to negative publicity about New Zealand race relations in the foreign press.[382]

Before antidiscrimination laws could be perceived as an appropriate solution, discrimination had to first be perceived as a problem. New Zealand's national self-perception as a racially egalitarian country shaped the way in which political elites, as well as the public, interpreted reported instances of discrimination against Maori. Such discrimination was customarily regarded either as an aberration or as the product of socioeconomic rather than racial differences.[383] Despite receiving numerous complaints of racial discrimination that were committed by private as well as state actors throughout the 1950s and 1960s, the Department of Maori Affairs refused to frame the problem in terms of race. For example, the Department of Maori Affairs files[384] contain numerous complaints of discrimination against Maoris by the Federated Farmers and by the Railways Department, which was accused of replacing Maori workers with Dutch immigrants.[385] Yet, the prevailing bureaucratic view was that racial discrimination was not a problem. Nor did politicians perceive racial discrimination, or any other kind of discrimination for that matter, as a pressing problem. In response to a questionnaire distributed to candidates of all parties

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381 *External Affairs Review*, October 1958, Vol. VIII, No. 10, p. 22.

382 MA 36 1/21, Memorandum for the Secretary of External Affairs, Wellington. Allegations of Racial and Social Tension in New Zealand (9 January 1953). The files showed concern over material that appeared in a publication produced by the Indian Embassy. In addition, the Departments of External Affairs and of Maori Affairs worked with New Zealand Deputy High Commissioner in London to address an editorial entitled "The Long Black Cloud" that appeared in the *Manchester Guardian* in 1960. See MA B.60/28/- "New Zealand Race Relations" (12 October 1960).

383 See McKean 1971a: viii

384 In 1989, the Department of Maori Affairs was disbanded and a Ministry of Maori Development, *Te Puni Kokiri*, was established.

385 See Letter from Rakaumanga Tribal Committee to Department of Maori Affairs, MA 36 1/21 (15 December 1952), and departmental memorandum in reply MA 21/8/11 (15 December 1952).

running in the 1966 election, for example, no candidate identified discrimination, race relations, or women's issues as one of the "most important" issues in the campaign.[386]

Of the numerous instances of discrimination against Maori contained in the files of the Department of Maori Affairs, one in particular garnered significant public attention. In 1955, Donald Hiki, a Maori, alleged that he had been denied employment with the Huntly Branch of the Bank of New Zealand (BNZ) on account of his race. Huntly is a small town in the Waikato region of the North Island. Hiki's accusations garnered national media attention.[387] At the time, the BNZ did not have any "male Maori officers" but did employ "two Maori girls."[388] According to a Department of Maori Affairs memorandum, the Bank's representatives asserted that "they have no rule debarring Maoris as such from employment" and that "[t]hey try to treat all cases on their merits."[389] A handwritten note accompanying the memo stipulated that the BNZ's rule held that an employee "must not be of a dark colour" because "some of their depositors were a bit fussy."[390] However, BNZ officials indicated that they "would not be keen, …, on employing any Maori of pronounced Maori physical or temperamental characteristics." In the memo, Hiki, presumably a man, was referred to as a "boy."[391] It was thought it would not be advisable to employ him in a "small town or district locality" and that if he were alternatively placed in "a bigger district headquarters" he might be unable to obtain board.[392] Representatives from the Department of Maori Affairs stressed to BNZ officials that "in the national interests it was necessary that everyone realize that one of the most important considerations we could have in this country

386 See Austin Mitchell, "The 1966 General Election: The Candidates and Their Campaigns" 21 (1) *Political Science* (September, 1969): 3-23, 18.
387 "No job at bank for Maori," *New Zealand Herald*, 29 April 1955.
388 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).
389 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).
390 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).
391 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).
392 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).

was the fitting of the Maori people fully and usefully into this community."[393] Further, "[i]n facing this national task, it was really necessary for all representative employers to try to do their share of what was involved."[394] Bank officials assured the Department that they would take these "national considerations" into account.[395]

Hiki's allegations were also addressed in Parliament. E.T. Tirikatene, a Maori MP who held one of the four seats reserved for Maori, asked Prime Minister Sidney Holland whether he had seen an article in the New Zealand Herald covering the BNZ's discrimination against Hiki, whether he would take steps to prevent further discrimination against Maori by the Bank, and whether he would "introduce legislation into Parliament this session making it an offense to discriminate against worthy citizens of New Zealand on account of race or colour?"[396] The Maori Women's Welfare League also picked up on Hiki's allegations. At their 1955 conference, the League presented a resolution "[t]hat the racial discrimination experienced in the Waikato region be investigated."[397] Attention to the growth of the Maori population generated an editorial that appeared in The Taranaki Daily News in October 1956.[398] Also that month, Reverend G.I. Laurenson addressed the Pahiatua Rotarians concerning the growth of the Maori population and its implications for race relations.[399] The specter was one of segregation, he said.[400]

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393 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).

394 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).

395 MA 36 1/21 19/1/539 Placement of Donald Hiki (8 March 1955).

396 Order Paper, House of Representatives, 11 May 1955.

397 It was Resolution 17. See MA 36 1/21 Response to Resolution from Maori Women's Welfare League Conference, p. 3

398 "Maori Progress and Problems," *The Taranaki Daily News* (4 October 1956), MA 19/1/539.

399 "Average Person does not Realize that Segregation could become a N.Z. Problem: Minister's Appeal to Employers to Give Maoris Fair Chance; Not Condemn Failure," *Manawatu Daily Times* (5 October 1956). See MA 19/1/539.

400 See the comments of Acting Secretary of Maori Affairs, J.K. Hunn in "Maori Isolation or Integration?" *The Gisbourne Herald* (12 November 1960).

In May 1958, the Rotary Clubs of New Plymouth and Waitara, on the western coast of North Island, conducted their own inquiries into the employment of Maori within their districts. One unnamed government department responded that they employed Maori "'with the qualification that Maori applicants would not be considered for posts involving meeting the general public.'"[401] In April 1960, the Department of Maori Affairs prepared a memorandum on "Non Legal Discrimination" in response to a request for such information from the Department of External Affairs. The memorandum concluded that for positions that involved "face to face" service with the public "there was a strong tendency to deny entry to Maori because of possible adverse and customer re-action."[402] In addition, it documented discrimination against Maori in housing, hotels, theaters, employment, barbershops, private bars, and lounges. The government contended that "integration" was the solution and suggested that "[e]very successful Maori-European marriage is a step towards it."[403]

In 1958, the New Zealand Rugby Union, a privately operated and very powerful business organization, again decided to exclude Maori players from the national team that would tour South Africa in 1960. This decision, in Richard Thompson's words, plunged the country "into what was perhaps its most vigorous controversy since the prohibition issue at the end of the last century."[404] In this context, Maori-Pakeha relations were reassessed and the country was reawakened to their importance. New Zealand's churches initiated public protests against the Rugby Union, and a new group, the Citizens' All Black Tour Association (CABTA), was formed. Rolland O'Regan, CABTA's leader, made clear that his group did not seek any form of civil rights legislation because it believed that such legislation would

401 "Employment of Maoris in the Public Service" MA Folio 202 36 1/21 (1 August 1958).
402 "Non Legal Discrimination" (1 April 1960) MA 36 1/21, p. 1.
403 "Relations between Maori and European People in New Zealand," MA 19/1/539 (10 May 1960), p. 2.
404 Thompson, 1961: 28

stigmatize New Zealand's reputation. Nor did CABTA seek executive action to stop the tour. Instead, it and the church groups opposing the tour sought an end to the caucus ban on MPs expressing their personal opinions on the issue, and they wanted the prime minister, Walter Nash, to persuade the Rugby Union to abandon the tour. In contrast to protests during the 1970s, O'Regan saw the rugby tour as a purely domestic issue.[405]

Nash, however, asserted that the issue was one for the Rugby Union to decide and said that the government could not interfere in the activities of a private organization. He expressly noted his lack of "legal power to intervene in the conflict."[406] The opposition leadership also agreed that the issue of discriminatory player selection was not one for Parliament.[407] In May, Tirikatene (MP) presented a formal petition to Parliament on behalf of the Bishop of Aotearoa,[408] among others, that asked for a "'full, formal and solemn statement' on New Zealand's race relations."[409] The petition specifically rejected anything in the way of civil rights legislation. In fact, it recognized that "personal acts of discrimination were 'beyond the legislative influence of the government unless that influence were to be dangerously extended.'"[410] As the general election of November 1960 approached, neither party proposed antidiscrimination legislation nor sought to make race an election issue. Rather, they each made symbolic gestures. The Labour Government, for example, secured a knighthood for Maori MP Tirikatene, and the National Party made a tentative reference to possibly incorporating the Treaty of Waitangi into some kind of bill of rights. The Treaty had been signed between representatives of the Crown and Maori in 1840. It served as a

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405 Richard Thompson, *Retreat from Apartheid: New Zealand's Sporting Contacts with South Africa* (London: Oxford University Press, 1975), 86-87.

406 Richard Thompson, "Community Conflict in New Zealand: A Case Study" *Race*, III (November, 1961), 28-38, 37.

407 Thompson, "Community Conflict in New Zealand: A Case Study," 33.

408 Aotearoa is the Maori word for New Zealand. It means "land of the long white cloud."

409 "Relations between Maori and European People in New Zealand," MA 19/1/539 (10 May 1960), p. 1.

410 Quoted in Harré 1963: 20.

rallying point for Maori who resented the subsequent confiscation of their lands, allegedly in violation of the terms of the Treaty.[411]

Within the bureaucracy, attention to issues of discrimination continued. In 1960, J.K. Hunn, the Deputy Chairman of the Public Service Commission and Acting Secretary for Maori Affairs, found there were still eighty-two subjects on which there were legal distinctions between Maoris and Europeans.[412] In his report, Hunn made several recommendations about Maori employment;[413] however, he did not call for antidiscrimination legislation. His report recommended that statutory "differentiation" between Maoris and Europeans be "reviewed at intervals and gradually eliminated."[414] Regarding societal discrimination, the Hunn Report, as it is known, stated:

> Endeavors have been made to elicit what the Departments know about racial discrimination in everyday life, as distinct from the differentiation to be found in statute law. Very little evidence has come to light either from the files or from the knowledge of senior officers. A few instances have been cited but they are isolated and extend over many years. They relate almost entirely to employment or accommodation and, even there, are quite noticeably on the wane. Such discrimination as may exist is obviously not racial but social and applies between different groups of society, whether Maori or European. Social distinctions, in all countries, will last as long as the human race; the faint traces of them in New Zealand are truly minimal and nothing to worry about.[415]

This, however, represented an overly optimistic interpretation of the evidence. The Hunn Report was significant because of what Richard Thompson described the "paucity of

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411 The Treaty of Waitangi has become the subject of a large body of literature. See Andrew Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*, 2nd ed. (Auckland: Oxford University Press, 1997); Mason Durie, *Te Mana, Te Kāwanatanga: The Politics of Maori Self-Determination* (Auckland: Oxford University Press, 1998); Ken S. Coates and P.G. McHugh, eds., *Living Relationships: The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998).

412 The final report was produced on 24 August 1960, but it was not published until 1961. In the interim, there was a change of government, and the National Party assumed power. J.R. Hanan decided to publish the Hunn Report for the public. See J.K. Hunn, *Report on Department of Maori Affairs with Statistical Supplement* (Wellington: R.E. Owen, Government Printer, 1961), 3.

413 *The Hunn Report*, 31-32

414 *The Hunn Report*, 78.

415 *The Hunn Report*, 78.

empirical research" available in the early 1960s.[416] Thompson further observed that much of the extant work consisted of graduate theses, and thus were of dubious value in his estimation.

David P. Ausubel, an American professor of educational psychology at the University of Illinois, entered into this research in the early 1960s. He offered a bleak assessment of New Zealand race relations.[417] During the 1960s, he garnered headlines in New Zealand about his books, *Maori Youth: a psychoethnological study of cultural deprivation* (1961) and *The Fern and the Tiki* (1965),[418] the latter of which amounted to an exposé of the country's racial problems. Within the Department of Maori Affairs, Ausubel's claims were characterized as "polysyllabic pyrotechnics."[419] J.R. Hanan responded by asserting that the scholar "resent[ed] New Zealand's good name for race relations and [was] bent on refuting it."[420] He suggested that although "many Pakehas have wrong ideas about Maoris that tend to colour their attitude" and although "[u]nhappy incidents do occur from time to time," Maoris nevertheless "know that the general feeling towards them is tolerant and friendly."[421]

PRESSURE FOR A LEGISLATIVE RESPONSE TO RACIAL DISCRIMINATION

In response to the Hunn Report, in 1962 the Maori Welfare Act established the New Zealand Maori Council, a body was charged with implementing the report's

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416 Richard Thompson, *Race Relations in New Zealand* (Christchurch: National Council of Churches, 1963), 53.
417 David P. Ausubel, "Race relations in New Zealand: Maori and Pakeha: an American view," 12 *Landfall* (Sept., 1958); David P. Ausubel, "Acculturative stress in modern Maori adolescence," 31 *Child Development* (Dec., 1960); David P. Ausubel, "The Maori: a study in resistance acculturation," 39 *Social Forces* (March 1961).
418 David Ausubel, *Maori Youth: a psychoethnological study of cultural deprivation* (North Quincy, Mass.: Christopher Pub. House, 1961); "American Scholar's Accusation: 'Deep Race Prejudice against the Maori in N.Z.," *Evening Post*, 21 April 1961; "Dr. Ausubel Attacks Again," *Taranaki Daily News* 24 April 1961. See also David P. Ausubel, *The Fern and the Tiki: an American view of New Zealand national character, social attitudes, and race relations* (New York: Holt, Rinehart and Winston, 1965).
419 MA 36/1/21 Part 3 (24 April 1961).
420 "Race Relations Minister's Comments," MA 36/1/21 Part 3 (24 April 1961), p. 1.
421 "Race Relations Minister's Comments," MA 36/1/21 Part 3 (24 April 1961), p. 1.

recommendations. That same year, the Sale of Liquor Act was amended to prohibit racial discrimination in hotels with regard to the provision of accommodations, meals, and liquor.[422] Discrimination against Maori also garnered the attention of opposition MPs. In July 1963, a Labour MP, Matiu Rata, brought before Parliament a report of housing discrimination in the town of Whangarei; and the in following year, Walter Nash, another Labour MP and former prime minister, consulted the Department of Maori Affairs about a covenant in a lease that prohibited its assignment to Maori, Hindu, Chinese or other colored persons. The Minister of Maori Affairs replied that "'most instances of racial discrimination cannot be successfully dealt with by legislation,'" but that this particular matter "'could be dealt with by an amendment to the Property Act.'"[423] The Property Law Act was subsequently amended in 1965 in order to prohibit restrictive covenants directed against individuals of a particular color, race, or ethnic or national origin. It did not, however, constitute a "general rule against discrimination" because the amendment did not address a "total refusal to enter into any assignment or contract relating to property on blatantly discriminatory grounds." Instead, it simply prevented one person from compelling another to discriminate.[424] Under an amendment to the Hire Purchase Act of 1971, withholding consent on racial grounds to the transfer of hire-purchase agreements was prohibited.[425] No vendor could refuse a purchaser the right to assign his interest under a hire purchase contract if the refusal stemmed only from the color, race, or ethnic or national origins of any person.

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422 See *Sale of Liquor Act 1962*, s. 199. According to R.G. Lawson (1970: 241), as of 1970, only a single prosecution under this section had been recorded, that in *Police v. Bonner* [1965] 11 M.C.D. 345. There a hotel manager and licensee were fined for refusing to serve liquor to a Maori on the basis of past bad behavior by Maoris.

423 Memorandum from B.E. Souter, Deputy Secretary of Maori Affairs, to the Minister of Maori Affairs concerning the Contracts (Racial Equality) Bill (24 September 1964), 36/1/21, Part 9, p. 1, quoting from the Minister's answer to Nash in Parliament.

424 Ryan 1972: 85.

425 Hire-Purchase Act §17(5).

In September 1964, a Contracts (Racial Equality) Bill was introduced into Parliament by a Labour MP. It sought to make void any contract, defined very broadly, that in any way had discriminatory provisions. The government consulted the Department of Maori Affairs for advice on the bill. The Department's leadership believed that any sort of antidiscrimination legislation would "tarnish" the "favourable opinion" held by "people in most countries" concerning New Zealand's race relations.[426] Moreover, it believed that discrimination was sporadic and that it could not be "cured or prevented by legislation."[427] Rather, "the economic and social causes of discriminatory attitudes" would "wither away" with improvements in "the Maori standard of living and hygiene."[428]

The Minister of Justice, Hanan, was also called upon by the government to provide an opinion on the Bill. He thought that as drafted the bill was "in some respects uncertain and in others dangerously wide."429 It might, for instance, be used against special provisions designed to aid and assist Maori. Hanan suggested that the Bill suffered from several weaknesses. First, it did not address instances where parties voluntarily abided by a restrictive covenant, although any attempt to control such behavior "would hardly be likely to be effective."[430] Second, it did not cover refusals to enter into contractual relations, but again he implied that this would not be practicable. And, third, the Bill failed to address refusals to admit individuals to public functions or gatherings, such as movie theaters. Hanan suggested that "[i]n the case of quasi-public places it might be possible to do

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426 Memorandum from B.E. Souter, Deputy Secretary of Maori Affairs, to the Minister of Maori Affairs concerning the Contracts (Racial Equality) Bill (24 September 1964), 36/1/21, Part 9, p. 2.

427 Memorandum from B.E. Souter, Deputy Secretary of Maori Affairs, to the Minister of Maori Affairs concerning the Contracts (Racial Equality) Bill (24 September 1964), 36/1/21, Part 9, p. 2.

428 Draft Memorandum for Members of Cabinet on Legislation on Racial Discrimination (March 1965), 36/1/21, Part 9, p. 3.

429 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 5.

430 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 4.

something about this if there is to be legislation on the subject at all."[431] Further, if there was to be such legislation, he suggested that it ought to be of the type that forbade courts from enforcing "covenants, conditions, stipulations or transactions that discriminate on the ground of race," rather than the type that made discrimination per se an offense.[432]

Hanan acknowledged that racially discriminatory contracts were being drawn up in New Zealand. In his opinion, by legislating before the "evil" became too serious Parliament might preempt arguments that such legislation constituted "interference with existing rights."[433] He advised that under the existing state of the law, contracts and dispositions of property containing discriminatory provisions on grounds of race or religion might be valid. Although under the common law certain contracts could be ruled void or illegal on grounds of public policy, in *Fender v. St. John Mildmay* [1937] 3 All E.R. 302, the court had precluded itself from creating new public policy. However, in *Lempriere v. Burgess* [1921] N.Z.L.R. 307, Hanan observed, the court invalidated a refusal to consent to the assignment to a Chinese fruit merchant of an agreement to lease. The lease agreement provided that consent should not be withheld arbitrarily or without good cause. Because the particular merchant involved in the case was adjudged respectable by the Court, good cause was not found. Hanan observed that some of the Court's remarks suggested that a refusal based upon race would always be regarded as unreasonable, but he was not convinced that other judges would

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431 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 4.

432 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 4.

433 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 1.

follow suit.[434] He further noted that an Ontario court had rendered void a restrictive covenant directed against Jews.[435]

Hanan proposed that "[a] more limited measure, directed at specific objectives, does however appear practicable and likely to be reasonably effective." Although none of its details had been worked out, such a law could address discriminatory conditions or covenants in contracts or conveyances relating to real or personal property , excluding wills and family settlements, as well as discriminatory consents and discretions in contracts and conveyances. Further, a law could also address denial of admission to places where the public is ordinarily admitted. He suggested considering both race and religion, noting that Canadian provincial laws addressed both and that with respect to Jews "it might be hard to say whether a discrimination was based on race or religion."[436] Cabinet, however, decided not to take any action.[437]

The matter was considered again during 1965 because it was anticipated that another bill similar to the Contracts (Racial Equality) Bill would again be introduced into Parliament by an opposition MP. Cabinet, therefore, debated whether it should act preemptively by introducing its own more limited bill. It was believed that with the introduction of Contracts (Racial Equality) Bill in the preceding session the issue of racial discrimination had been brought "out into the open" and, therefore, could "no longer be ignored."[438] Although the Department of Maori Affairs continued to object, other factors now overweighed its

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434 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 2.

435 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 2. He was referring to *Re: Drummond Wren* [1945] OR 778.

436 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 6.

437 Draft Memorandum for Members of Cabinet on Legislation on Racial Discrimination (March 1965), 36/1/21, Part 9, p. 1.

438 Draft Memorandum for Members of Cabinet on Legislation on Racial Discrimination (March 1965), 36/1/21, Part 9, p. 2.

objections. It was felt that the government could not prevent cases of discrimination from being publicized. Allegations that the government had refused to act "could harm our image overseas much more than the passing of legislation would." Moreover, because "[m]any countries attach much greater importance than we do to legislative declarations of policy," the enactment of such legislation before serious problems emerged "might well enhance rather than damage our relations with other countries."[439] Finally, the "withering away" of discrimination might take too long, especially considering the urbanization of Maori and the potential for racial discrimination to be directed against "Islanders, Indians and Chinese."[440] For his part, the Deputy Secretary for Maori Affairs felt that the proposed legislation would have little practical effect, and feared that it might facilitate demands "for more legislation to deal with other kinds of discrimination."[441]

In October 1965 the Attorney General, Hanan, sent a copy of the draft ICERD to the Department of Maori Affairs. He noted that "[t]he question of racial discrimination has occupied a great deal of United Nations effort in the last year or so" and that the Attorney-General's Office had every reason to believe that "it will be treated as a question of first class political importance" in the coming session.[442] Hanan observed that "the pressures for a compelling statement of rights and obligations on this subject have led to a rather far-reaching text." Communications with other "Western governments" indicated that the existing draft ICERD was probably "about the best that can be hoped for" and "will have to be given general support," although New Zealand would try to work with other Western,

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439 Draft Memorandum for Members of Cabinet on Legislation on Racial Discrimination (March 1965), 36/1/21, Part 9, p. 3.

440 Draft Memorandum for Members of Cabinet on Legislation on Racial Discrimination (March 1965), 36/1/21, Part 9, p. 3.

441 Memorandum on Legislation on Racial Discrimination by Secretary for Maori Affairs to the Secretary of Justice (17 March 1965), 36/1/21, Part 9.

442 Draft ICERD and Memorandum from the Attorney General to the Department of Maori Affairs (11 October 1965), 36/1/21, Part 9, p. 1.

and especially Commonwealth, governments in order to moderate it.[443] Politically, Hanan expected both international pressure as well as pressure "from a responsible section of New Zealand opinion" for the government to become a party to the ICERD.[444] In assessing the draft, Hanan felt that an article requiring states to provide effective legal protection and remedies against acts of racial discrimination would cause particular problems for common law countries "whose systems provide legal safeguards regarding incidents of discrimination only when they happen to fall under ordinary actionable legal categories or under such limited legislative provisions as happen to deal especially with racial discrimination."[445] Hanan wrote that "to a degree" he did not share the view expressed by the Deputy Secretary of Maori Affairs.[446] He suggested that the introduction of the Contracts (Racial Equality) Bill might have "changed the tactical situation."[447] The leadership within the Department of Maori Affairs, by contrast, remained opposed to any antidiscrimination legislation.

In March 1966, the Secretary of Labour wanted to avoid using the term "discrimination" at all, preferring the term "integration" instead.[448] He concluded that there was "little or no discrimination based on colour" with regard to employment.[449] J.M McEwen, then Secretary for Maori Affairs, was "alarmed" in 1967 at the suggestion that "special judicial machinery" designed to consider allegations of racial discrimination should

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443 Draft ICERD and Memorandum from the Attorney General to the Department of Maori Affairs (11 October 1965), 36/1/21, Part 9, p. 1.

444 Draft ICERD and Memorandum from the Attorney General to the Department of Maori Affairs (11 October 1965), 36/1/21, Part 9, p. 1.

445 Draft ICERD and Memorandum from the Attorney General to the Department of Maori Affairs (11 October 1965), 36/1/21, Part 9, p. 2.

446 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 2, 6.

447 Memorandum on Contracts (Racial Equality) Bill prepared by the Minister of Justice (6 October 1964), 36/1/21, Part 9, p. 6.

448 Letter concerning Draft International Convention on Racial Discrimination from the Secretary of Labour to the Secretary and Maori Trustee (29 March 1966), 36/1/21, Part 9, pp. 2, 8.

449 Letter concerning Draft International Convention on Racial Discrimination from the Secretary of Labour to the Secretary and Maori Trustee (29 March 1966), 36/1/21, Part 9, pp. 2, 8.

be established in New Zealand. He asserted that "[i]f we are forced by virtue of being a party to the [ICERD] to enact totally unnecessary legislation providing for a judicial procedure for the investigation of complaints of racial discrimination in public life, then let it be brought within the jurisdiction of the ordinary courts of the land or perhaps the Ombudsman," a post that had been created in 1960.[450]

In 1968, Hanan, still Attorney-General and Minister of Justice, observed that New Zealanders did not "look with much favour" upon antidiscrimination statutes due to their skepticism that discrimination can be stopped "by fiat of Parliament" (1968: 187). Nevertheless, he publicly indicated that such legislation would be forthcoming, "partly because nowadays we rightly regard any form of discrimination on grounds of race as a social evil and moral affront, but mainly for international reasons." It was "necessary" that New Zealand ratify the ICERD, even though ratification required legislation "previously considered undesirable" because failure to do so would leave the country vulnerable to charges of hypocrisy.[451]

Unlike Australia, Canada, and the U.S., New Zealand did not confront any issues arising from a federal system or a written constitution. Moreover, because the Parliament's upper chamber, the Legislative Council, had been abolished in 1950,[452] proponents of antidiscrimination legislation did not face a potentially hostile second chamber, as it did in Australia's Senate in 1975. New Zealand governments thus enjoyed a strong institutional position from which to legislate against discrimination, but the political parties were largely apathetic about antidiscrimination legislation and there was no strong coalition of societal interests demanding antidiscrimination legislation and interested in the specific form that

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450 International Convention on the Elimination of All Forms of Racial Discrimination, 36/1/21, p. 3. Memo to the Secretary of External Affairs, dated 7 August 1967.

451 Hanan 1968: 188.

452 The Legislative Council Abolition Act was enacted under a National Party government.

such legislation should take. A number of New Zealand MPs continued to question whether such legislation was necessary and whether it might exacerbate rather than ameliorate racial tensions.[453]

THE RACE RELATIONS ACT 1971

Support for legislation prohibiting racial discrimination emerged within the Department of Justice as early as 1964, and instances of racial discrimination were brought before Parliament throughout the 1960s. The issue of antidiscrimination legislation was on the governmental agenda for a number of years, yet Cabinet repeatedly rejected proposals for pursuing such legislation in Parliament. This changed in 1971. I argue that the National Party Government of Keith J. Holyoake pursued race relations legislation in 1971 for two reasons. First, New Zealand was increasingly drawing criticism from international and domestic sources for its sporting contacts with South African teams.[454] In 1970 and 1971, two groups, Halt All Racist Tours (HART) and Citizens Association for Racial Equality (CARE), were fully mobilized as part of an effort to sever the sporting links between the two countries.[455] Unlike CABTA, the organization dating from the 1950s, the membership of these new groups was younger and more open to aggressive and confrontational tactics. It was also more connected to transnational NGOs opposing apartheid and South African rugby tours in other countries, as well as to the UN. For example, the UN Special Committee on Apartheid expressed its moral support for the New Zealand protest

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453 See the remarks of Sir Leslie Munro, 377 *NZPD* 5114; David Thomson, 377 *NZPD* 5304; Dr. Finlay, 377 *NZPD* 5310. This view was also put forth by Maori representatives; see Matui Rata, 377 *NZPD* 5316; Reweti, 377 *NZPD* 5320.

454 Alley 1991: 174-175; Thompson, *Retreat from Apartheid*, 119.

455 Thomas Oliver Newnham, *Apartheid is not a Game: The Inside Story of New Zealand's Struggle against Apartheid Sport* (Auckland: Graphic Publications, 1975).

movement.[456] The UN had also designated 1971 as the International Year against Racial Discrimination, creating an opportunity for the Holyoake government to make an important symbolic statement by finally transposing the terms of the ICERD into domestic law. Indeed, the international imperative dominated parliamentary debates over the race relations bill.

The second reason for governmental action in 1971 derived from domestic politics. A new generation of Maori leadership was emerging. It was more aggressive than its earlier counterparts, and it challenged the very legitimacy of the New Zealand state. The Holyoake government had held power since 1960. By 1970, "there were murmurings of dissatisfaction" with the government, and it was suggested by some that Holyoake "'was out of step with the times.'"[457] Pakeha were also participating in organizations focused on the issue of race. In February 1970, the New Zealand Race Relation Council was formed from numerous church, trade union, university and CARE groups across the country. It pressed the government to ratify the ICERD and implement its provisions into law. Domestically, therefore, the enactment of race relations legislation allowed the government to portray itself as responding to new developments within New Zealand, namely the emergence of a new generation of more aggressive leaders. The Holyoake government had not consulted with civil society organizations in drafting the Bill.[458] At the same time that it responded to new political demands, however, the government also had to take care not to alienate its traditionally-minded constituency. The cautious nature of its bill was intended to prevent that from happening.

In May 1970, Prime Minister Holyaoke advised the House that he had instructed officials to study the legislative provisions or amendments that would have to be introduced

456 Thompson, *Retreat from Apartheid*, 89.
457 Wood 1997: 43.
458 See 377 *NZPD* 5308-09, 5339

prior to ratification of the ICERD. He expressed his government's commitment to ratification on two subsequent occasions.[459] In the Governor-General's Speech on 25 February 1971, Holyoake's National Party government formally announced its intention to introduce a Race Relations Bill as part of its observance of the UN's International Year against Racial Discrimination.[460] Three months later, the Labour Party's conference "'urged'" the government to ratify the ICERD "'this year,'" and expressed its support for "'race relations legislation'" to prohibit racial discrimination in facilities and services, accommodation, employment, and places of public resort.[461]

In July 1971, the Holyoake government presented Parliament with a Bill that prohibited discrimination on grounds of color, race, and national or ethnic origins and was enforced through the conciliation of individual complaints. Table 4.1 presents the timeline from the Bill's introduction to its enactment. The Bill's long title, "A Bill to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination," indicated the explicitly international context within which it was being considered. So, too, did the arguments expressed by members on both sides of Parliament. For example, in introducing the Bill, D.J. Riddiford, who had become Minister of Justice in 1969, emphasized the "international pressures on States to take positive measures to combat racial discrimination," and he observed that other Western European democracies were parties to the ICERD. Internal documents of the Department of Justice explicitly stated that the Bill's "principal purpose" was "the limited

459 The first was in a November 1970 press statement, discussed at 377 *NZPD* 5342, and the second was on 29 January 1971, in a statement concerning New Zealand's commemoration of 1971 as the UN's International Year for Action to Combat Racism and Racial Discrimination.

460 371 *NZPD* 4.

461 See 377 *NZPD* 5339.

one of enabling New Zealand to ratify the [ICERD]," noting that it was "essential" to understand the Bill in that context.[462]

Table 4.1: Race Relations Act Legislative Timeline

Race Relations Bill introduced into Parliament	9 July 1971
Race Relations Bill referred to Statutes Revision Committee	9 July 1971
Statutes Revision Committee reports back to Parliament	7 December 1971
Race Relations Act enters into force	1 April 1972
New Zealand ratifies the ICERD	22 November 1972

Rather than engaging in philosophical arguments about the appropriate role of the state in society, most of the parliamentary debate consisted of political potshots and point scoring, although Labour's Allan M. Finlay asserted that "this is a Bill of considerable complexity which deals with a question that goes deep into our social roots."[463] A few MPs did perceive the Bill's broad significance. Thomson, for example, asserted that it would reaffirm "the commitment of Parliament and the New Zealand people to complete and genuine racial equality" and serve as "a formal statement of a fundamental policy."[464] Hugh C. Templeton saw ratification of the treaty as a "moral imperative" and a need to show that

462 "Race Relations Bill, Report of Department of Justice," Office of the Clerk of the House of Representatives, ABGX, W3706/28, p. 1.
463 Finlay, 373 *NZPD* 1702
464 377 *NZPD* 5305.

NZ is "committed to a multi-racial society."[465] He further argued that in their effort "to make a nation," the Bill will act as "a norm and a guide for every Minister and every civil servant, every teacher, and every person concerned with the development of our nation."[466]

The bipartisan support expressed for antidiscrimination legislation was not deeply felt on either side of the House. Both parliamentary debates and submissions to the Statutes Revision Committee revealed significant apathy among MPs regardless of party affiliation. No Members advocated the creation of a strong antidiscrimination law. In the opinion of Sir Guy Powles, who was subsequently named the Race Relations Conciliator, the period of debate on the Bill revealed "considerable opposition to and misunderstanding about the Act."[467] After the Bill's first reading, it was sent to the Statutes Revision Committee, and the proceedings of that Committee were opened to the public and the media.

The government had proposed the bare minimum necessary for ratifying the ICERD, and this shaped the terms of the parliamentary debate. Even National Party MPs who wholly supported the Bill showed no inclination to create a policy that facilitated a wider legal mobilization against discrimination. The Bill protected against discrimination by reason of the color, race, or ethnic or national origins of persons or of any of their relatives or associates. During the course of the parliamentary debate, several Labour MPs suggested adding additional protected grounds, including sex,[468] religion,[469] creed,[470] and economic status.[471] In light of those proposals, Tirikatene-Sullivan suggested that the proposal be

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465 373 *NZPD* 1704.

466 377 *NZPD* 5324, 5363.

467 Office of the Race Relations Conciliator, *Annual Report* (Wellington: A.R. Shearer, Government Printer, 1973), 4.

468 This was suggested by Rata, see 371 *NZPD* 163; 373 *NZPD* 1702-03; and, by Tirikatene-Sullivan, see 373 *NZPD* 1705.

469 This was suggested by Norman Kirk, see 373 *NZPD* 1708.

470 This was suggested by Tirikatene-Sullivan, see 373 *NZPD* 1705. The Minister of Justice also expressed his personal desire to include creed, see 373 *NZPD* 1706-07.

471 This was suggested by Kirk, see 373 *NZPD* 1704-05.

renamed the "Antidiscrimination Bill."[472] The Minister of Justice contended that that these other grounds were excluded because they were not addressed by the ICERD.[473] However, this was something of a false argument, for the government was not strictly limited to legislating the terms of the ICERD, as was Australia under its constitution. Rather, the inclusion of other groups would have taken the Bill beyond the narrow political consensus within the government's ranks. As enacted, no additional protected classes were added.

In terms of its scope, the Bill covered access to public places, vehicles, and facilities; the provision of goods and services; employment; land, housing and other accommodation; and, advertisements.[474] The employment provision contained several exemptions, including one for "work involving national security" and employment on non-New Zealand ships or aircraft where that employment was sought outside New Zealand.[475] In addition, it contained a loosely worded exemption for employment "for any purpose for which persons of a particular ethnic or national origin have or are commonly found to have a particular qualification or aptitude."[476] In contrast to American and British legislation, the housing provision did not contain an exemption for "Mrs. Murphy's" boardinghouse, or in British terms, "close communities—premises in which the owner shares part of the facilities with tenants; nor did the Bill apply to trade unions, which were believed to operate in a racially nondiscriminatory manner in New Zealand.[477] It permitted racial distinctions in certain charitable instruments.[478]

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472 See 373 *NZPD* 1705.

473 373 *NZPD* 1706-07, 1708.

474 See Race Relations Act 1971, ss. 3-7. In addition, s. 27 voided restraints on marriage based upon race, color, or ethnic or national origins.

475 See Race Relations Act, s. 5(4) and (5).

476 See Race Relations Act, s. 5(3).

477 Thomson, 377 *NZPD* 5306.

478 See Race Relations Act 1971, s. 36.

The government's ambivalence and low expectations for the Bill were evident in the parliamentary debate. The Minister of Justice, for example, acknowledged that it was already against the law to refuse to sell or let a house to a person on the grounds of race. Yet, in spite of that and provisions within the Race Relations Bill that prohibited discrimination in property transactions, he nevertheless suggested that "a person retains the right to decline to sell his house to someone whom he does not like, whether he be black, white or brown."[479]

The Department of Justice observed that a number of witnesses before the Statutes Revision Committee failed to "grasp" the limited purpose of the Race Relations Bill.[480] Rather than seeing the measure as an instrument to satisfy international commitments, witnesses viewed it as a broader social charter. In all, thirty-four submissions were made to the Committee. Seven were made by individuals, including university lecturers, priests, and two Maori. Submissions were also made by several Maori groups, including *Nga Tamatoa* (the "Young Warriors"), the Maori Graduates Association, and the New Zealand Maori Council. There were no submissions from any representatives of New Zealand's Pacific Island community, nor from any members of the small Chinese, Indian, Greek, or Slavic communities resident in the country. The New Zealand Race Relations Council, HART, and CARE made supportive submissions, as did the National Council of Churches and the Public Service Association. In his submission to the Statutes Revision Committee on the Race Relations Bill, Guy Powles, in his capacity as Ombudsman, made a submission in which he said it would be "administratively practicable to combine the offices of Ombudsman and Race Relations Conciliator provided a full deputy was appointed on each side."[481] He citied research commissioned by the UN Institute for Training and Research in

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479 373 *NZPD* 1710.

480 "Race Relations Bill, Report of Department of Justice," Office of the Clerk of the House of Representatives, ABGX, W3706/28, p. 1.

481 Office of the Race Relations Conciliator, *Annual Report* (Wellington: A.R. Shearer, Government Printer, 1973), 4.

support of the idea that racial discrimination should and could be adequately redressed through legal means, a point that was revisited during parliamentary debate.[482]

Maori groups attacked the government for failing to consult with them. The Maori Graduates Association worried that the law could be used to dismantle Maori institutions and organizations, such as the four parliamentary seats reserved exclusively for Maori. The advantages of conciliation over harsher methods of law enforcement were accepted by most organizations. But, the New Zealand Law Society thought that it might appear "to some complainants that the Act lacks certain and effective means of enforcement."[483] Many of the submissions on the Race Relations Bill questioned the Attorney-General's role in the bringing of civil proceedings. The Ombudsman, Guy Powles, who would also serve as the first RRC, stated that he could not see "any real need for the interposition of the Attorney-General." Rather, he suggested, if conciliation fails, the Conciliator "ought to be able to exercise his own judgment about the need for court proceedings, and he should therefore be able to initiate them in appropriate cases."[484] The New Zealand Law Society thought the procedure "unduly cumbersome" and "likely to deter complaints being taken to court in all but the most flagrant or serious cases of discrimination."[485] *Nga Tamatoa* argued that for the legislation "to have any meaning at all, [it] must bind the Crown, its servants and all its departments."[486]

The issue of who may file a complaint constitutes an important element of antidiscrimination legislation. Witnesses appearing before the Statutes Revision Committee encouraged an amendment to allow persons other than the aggrieved to file a complaint.

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482 Submission of Guy Powles on the Race Relations Bill, p. 2. See also See 377 *NZPD* 5328.

483 Submission of the New Zealand Law Society on the Race Relations Bill, p. 3. Copies of all submissions are on file with the author.

484 Submission of the Ombudsman on the Race Relations Bill, p. 2.

485 Submission of the New Zealand Law Society on the Race Relations Bill, p. 6.

486 Submission of the *Nga Tamatoa* Council on the Race Relations Bill, p. 3.

David Thomson remarked that this question gave the committee "a great deal of difficulty" because the "last thing" they wanted to do was "encourage the interfering busy-body or the person or organization that for its own purposes wishes to foment complaints and grievances." Yet, he observed, "as the New Zealand Law Society pointed out, some people who may be subjected to racial intolerance may not themselves lay complaints with the conciliator simply because they may be inarticulate or ignorant of their rights…"[487] No amendments were made, but the language of the Bill was, itself, ambiguous, providing that the Conciliator was authorized to investigate a "complaint made to him by any person."[488] At the same time, the Bill accorded him discretion to refuse to investigate where the "complainant has not a sufficient interest in the subject-matter of the complaint."[489] Such decisions by the Conciliator were not subject to judicial review.[490]

The Statutes Revision Committee ultimately made three main amendments in response to concerns expressed by witnesses who came before it. First, it eliminated what it feared to be a "loophole" from the legislation.[491] Originally, the Bill provided that race or color had to be the only reason for the discriminatory treatment, but at the suggestion of Committee witnesses that word was stricken from the Bill. Representatives from the Department of Justice suggested that the proper test would be whether or not the discriminatory act or practice complained of would have occurred but for the race or color of the aggrieved person and further that, regardless of the phrase used, the plaintiff still bore the burden of showing a discriminatory motive.[492] Second, the Bill was amended to extend

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487 Thomson, 377 *NZPD* 5307.
488 Race Relations Act 1971, §13(a).
489 Race Relations Act 1971, §14(1)(c).
490 Race Relations Act 1971, §19.
491 See Thomson, 377 *NZPD* 5307; and Wilkinson, 377 *NZPD* 5335
492 See Wilkinson, 377 *NZPD* 5335.

its reach to employment agencies, real estate agents, and accommodation agencies.[493] And third, the Crown was made subject to civil proceedings that could be initiated by an individual complainant. Originally, the Crown had been exempt from such proceedings. The Minister of Justice had asserted that this change was unnecessary "because obviously the Crown will take administrative steps to see that the law is complied with."[494] Although some submissions did not support the Attorney-General's role in bringing civil proceedings on behalf of individuals, his role was not changed because it was thought "proper that, as a matter of social justice, the State should intervene on behalf of a person discriminated against on racial grounds rather than place on him the burden and expense of bringing proceedings himself."[495]

Aside from these changes, the Race Relations Act 1971 closely resembled the Bill as it had been introduced into Parliament, with only minor changes being made by the Statutes Revision Committee. The Race Relations Act 1971 prohibited racial discrimination in: public places, vehicles, and facilities;[496] the provision of goods and services,[497] employment, including employment agencies, but excluding national security workers on grounds of national origin and workers on non-NZ ships or aircraft;[498] land, housing, and other accommodation;[499] and, in advertisements.[500] According to the Minister of Justice, religion

493 See 377 *NZPD* 5307.

494 See 373 *NZPD* 1701.

495 Thomson, Acting Minister of Justice, 377 *NZPD* 5307. See also "Race Relations Bill, Report of Department of Justice," Office of the Clerk of the House of Representatives, ABGX, W3706/28.

496 Race Relations Act 1971, §3.

497 Race Relations Act 1971, §4.

498 Race Relations Act 1971, §5.

499 Race Relations Act 1971, §6.

500 Race Relations Act 1971, §7.

was not included as a protected ground because it did not appear in the ICERD.[501] There were, however, no institutional barriers to extending the legislation to encompass religion.[502]

With one exception, complaints of discrimination were not to be directly actionable in the courts, but rather they had first to undergo a process of conciliation administered by the Race Relations Conciliator,[503] a newly created post. The exception was complaints of discrimination with regard to access to public "places, vehicles, and facilities," for which criminal proceedings could be initiated.[504] The Conciliator was authorized to investigate alleged instances of discrimination either in response to a complaint made by "any person" or upon "his own motion."[505] It was understood, however, that although the Conciliator possessed the power to act on his own motion, he would nevertheless "await a complaint made to him before he takes action."[506] Complaints of discrimination could be brought against private actors as well as against the Crown.[507] "If convinced that a breach of the law had occurred, the Conciliator was authorized to secure a "settlement" between the parties and assurances against any future discrimination.[508]

If conciliation failed, there were two different processes depending upon whether the claim had been brought against the state or against a private actor. If the latter, the Race Relations Conciliator was required to report to the Attorney-General and make a recommendation that the Attorney-General institute civil proceedings against the alleged

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501 See 377 *NZPD* 1708

502 New Zealand had a history of discriminating against Jehovah's Witnesses. During World War II, the Jehovah's Witnesses were declared a subversive organization because of their views on the war, and many adherents of the faith were incarcerated. As late as the 1950s, they suffered discrimination in gaining access to public meeting halls. There is no record of New Zealand lawyers taking up their cause.

503 Race Relations Act 1971, §10-20.

504 Race Relations Act 1971, §24.

505 See Race Relations Act 1971, §13.

506 Finlay, 373 *NZPD* 1702.

507 Race Relations Act 1971, §2.

508 See Race Relations Act 1971, §17(a).

discriminator in the Supreme Court.[509] The law provided that the "aggrieved person" was not to be an original party to those proceedings; nor was he to "join or be joined in" those proceedings unless otherwise ordered by a court of law.[510] The Attorney-General could decline to initiate suit, despite the Conciliator's recommendation. In that event, he was required to issue a certificate to the aggrieved person, who was then authorized to initiate court proceedings in his own name.[511] If the complaint was against the Crown and conciliation failed, the Conciliator could issue the aggrieved person a certificate thereby authorizing the private pursuit of court proceedings. For such cases, "the reasonable costs and expenses of the aggrieved person, including costs incurred between solicitor and client" were to be "taxed by the Court and paid by the Crown," unless the Court ordered otherwise.[512]

Assigning this role to the Attorney-General was controversial in the parliamentary debates. Because courts operated through a public process, Labour MP Rata thought that it should be left to them rather than the Attorney-General to determine whether charges were frivolous or trivial.[513] Rata suggested that "[m]inorities must seek redress on the same grounds that majorities must seek redress. An accused person must have the same right as anybody else to appear before a judicial body;" he wanted matters to go directly to the courts.[514] This did not mean that he liked the legislation, for he said that given the violations of the Treaty of Waitangi he had "never been impressed with paper guarantees."[515] Norman

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509 Race Relations Act 1971, §17(2). The Bill also provided for the refusal of licenses and registration on grounds of a violation of §§3-7 of the Bill, see Race Relations Act 1971, §23.

510 Race Relations Act 1971, §21(2). In the event that costs were awarded against the Attorney-General, they were to be paid by the Attorney-General without any right to indemnification by the aggrieved person, Race Relations Act 1971, §21(6).

511 Race Relations Act 1971, §21(4).

512 Race Relations Act 1971, §21(7).

513 See 373 *NZPD* 1709; and Faulkner, 373 *NZPD* 1710.

514 373 *NZPD* 1702-03.

515 March 4, 1971, 371 *NZPD* 162.

Kirk, also of the Labour Party, feared that the decision to prosecute would be dictated by the politically-driven decision making of Cabinet rather than an objective assessment of the merits of a case.[516] Thomson countered that the Attorney-General's role was appropriate because "as a matter of social justice, the State should intervene on behalf of a person discriminated against on racial rounds rather than place on him the burden and expense of bringing proceedings himself."[517] MP Riddiford added that the Attorney-General's function was appropriate and not unusual and that it was hoped he would be "distinguishing between a political action and a purely legal one."[518]

Thomson, a National Party MP who would later play a key role in the enactment of legislation prohibiting sex discrimination, acknowledged the alternative modes of enforcement, namely, establishing "a series of criminal offenses" or giving "complainants the initial right to bring a civil action in the ordinary courts." He argued against those adversarial approaches, suggesting that they might exacerbate race relations and create animosities, as opposed to facilitating mutual understanding and "the patient removal of grievances between people of different races or origins." Litigation was thus to be "a last resort when all else has failed."[519]

In its initial years of existence, the Office of the Race Relations Conciliator was severely understaffed. Sir Guy Powles was named as the first Race Relations Conciliator on 23 December 1973, and at that time he was also serving as the country's first Ombudsmen. Those two positions were considered part-time, and they were thought to be sufficiently similar to warrant having the same person in each. However, the workload quickly proved too much and Ken H. Mason, a non-lawyer, was appointed as a part-time Deputy

516 373 *NZPD* 1708.
517 377 *NZPD* 5307.
518 373 *NZPD* 1706.
519 377 *NZPD* 5306.

Conciliator in 1972. Race Relations Offices were located in Auckland and Wellington; although the Wellington office was closed in 1973.[520] Powles subsequently resigned in April 1973, and by the end of February 1974, the new Labour Government had still not replaced him. This left the Deputy Race Relations Conciliator working one day per week and the Executive Officer doing all of the rest of the work,[521] which indicated the low priority accorded to the work of the Race Relations Conciliator by the government. In 1973, Powles was asked whether he thought the government's inattention to his former post was attributable to an expectation that a human rights commission would be created like those existing in Canada. He expressed doubt as to whether there would be "'much enthusiasm for [that] in the present political climate.'"[522]

Before his departure, Powles took great pains to persuade Maori leaders that the Race Relations Act 1971 could be a force for positive action, and he tried to assuage their fears that it would be used to undermine special arrangements for Maori. He convened a meeting with the New Zealand Maori Council in 1972, in order "to dispel misconceptions and to give information on how the Act might work." Duncan MacIntyre, Minister of Maori Affairs, also addressed the Council.[523] At that meeting, Maori leaders expressed concern "about the possible effects of the Race Relation Act on some of the established practices and institutions particularly prized by the Maori people as significant of their racial

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520 Following that closure, the number of complaints filed in the Wellington/South Island area fell from twenty-five in 1972-73 to fourteen for the year 1973-74. Meanwhile, 78.3% of all complaints filed in 1973-74 originated in the Auckland area, Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 1974), 4.

521 *Dominion* (Wellington), 20 February 1974.

522 Correspondence from Sir Guy Powles to Timothy McBride (5 December 1973), quoted in Tim McBride, "Anti-discrimination legislation in the provinces of Canada and in New Zealand: a comparative study" (LLM Thesis, Dalhousie University Canada, 1974), 169, n. 154.

523 Office of the Race Relations Conciliator, *Annual Report* (Wellington: A.R. Shearer, Government Printer, 1973), 4.

identity."[524] They feared the loss of separate Maori representation in Parliament, the existence of Maori boarding schools, and the concept of the Maori marae. The Council requested a clear statement by the prime minister on such matters. Prime Minister John R. Marshall did so in a letter addressed to the Council, which he also released to the press in order to document the government's attitude on the matters. Marshall felt that such a letter was not wholly warranted because the Race Relations Act did not override any other existing statutes and because it expressly exempted from the Act's operation anything directed towards helping particular groups to achieve equality in the community. Nevertheless, he pledged that the government would not "promote or introduce legislation affecting the existence of any currently accepted Maori institution or organization whether authorized by statute or stemming from tradition, without having full consultation with the New Zealand Maori Council. Further, if it appeared that the Act in any way threatened Maori institutions or organizations, the Council would be consulted and the Act amended if necessary.

Although Race Relations Commissioner Powles tried to cultivate support among Maori organizations, those organizations never really saw the Race Relations Act as providing a mechanism for mobilizing actions. New Zealand courts had never constituted an avenue for mobilization by discontented groups. Thus, in contrast to African Americans, Maori had no history of mobilizing court actions. Maori organizations were not legally oriented. Moreover, Maori did not want equal rights; they wanted land rights and autonomy. At the time, Maori were busy mobilizing around the longstanding issue of land rights and the Treaty of Waitangi. In 1975, a coalition of groups formed *Te Ropu o te Matakite* to combat further alienation of Maori land. In September and October of that year, Whina Cooper, a former leader within the Maori Women's Welfare League, led a Maori Land March to

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[524] Letter from Prime Minister J.R. Marshall to New Zealand Maori Council, dated 5 May 1972. Reproduced in Appendix C, Office of the Race Relations Conciliator, *Annual Report* (Wellington: A.R. Shearer, Government Printer, 1973), 40.

Wellington in order to focus attention on Maori grievances. The march culminated with the arrival of approximately 5,000 marchers in the Parliament's grounds, whereupon Cooper presented to Prime Minister Bill Rowling a list of rights from two hundred Maori elders and a petition supporting the objectives of the march signed by 60,000 people. Acknowledging the centrality of land rights issues, a Waitangi Tribunal was established by act of Parliament on 10 October 1975. Within academic writing, the Treaty of Waitangi served as an increasingly popular subject of analysis,[525] while the Race Relations Act was largely neglected by Maori groups.

Before long, however, a few new organizations referred complaints to the Race Relations Conciliator. According to the annual report for 1973, in that year three different organizations referred complaints to the RRC. These included the Southland Council for Racial Harmony (complaint about housing discrimination against a Maori couple); the Nelson Race Relations Action Group (complaint about the refusal of boarding house accommodations to a Maori girl); and the Auckland Action Committee to Combat Racism and Racial Discrimination, which referred two complaints to the Conciliator. No similar complaints were recorded in the annual reports until 1978, when the Conciliator received a complaint from the New Zealand Freedom from Discrimination Group. During the 1970s, the Auckland Committee on Racial Discrimination was also operating. It occasionally made representations to the Race Relations Conciliator,[526] but at times it took a more adversarial approach to race relations that the Conciliator eschewed.[527]

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525 See Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin/Port Nicholson Press, 1987); I.H. Kawharu (ed.), *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (New York: Oxford University Press, 1989); and, Paul G. McHugh, *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (New York: Oxford University Press, 1991).

526 See Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 1980); Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 1981); Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 1983).

527 See Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 1976).

ANTIDISCRIMINATION LEGISLATION FOR WOMEN

Even before the Holyoake government had committed itself to race relations legislation in 1971, it was confronting the issue equal employment rights for women. In 1968, the government established a National Advisory Council on the Employment of Women. Women's consciousness as "a separate political force," however, only began to form in 1969, although the initial cries for women's liberation fell upon deaf ears among male-dominated leftist groups.[528] The first women's liberation groups appeared in 1970; they included the Wellington Women's Liberation Front, the Auckland Women's Liberation Front, and the Women's Movement for Freedom. By a year later, six more organizations had been established across the country, including in the regional centers of Palmerston North and Dunedin. Throughout the early 1970s, these groups increased in number and proliferated across both the north and south islands. In 1972, a National Organization for Women (NOW) was established. Like its American counterpart, it was created in order "to pursue traditional women's rights goals in conventional ways."[529] That same year, two hundred women attended New Zealand's first women's liberation conference, held in Wellington, and the following year, 1,500 attended the United Women's Convention in Auckland.[530] Women's groups were demanding an array of social policy reforms, including equal pay for women in the private sector.[531] Their efforts to desegregate men's-only pubs,

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528 Christine Dann, *Up From Under: Women and Liberation in New Zealand* (Wellington: Allen & Unwin/Port Nicholson Press, 1985), 3-4.

529 Dann, *Up From Under*, 9.

530 Maud Cahill and Christine Dann, "Introduction" in Maud Cahill and Christine Dann (eds.), *Changing our lives: women working in the women's liberation movement, 1970-1990* (Wellington: Bridget Williams Books, 1991), 1-9, 2.

531 In 1960, the Labour Government of Walter Nash had enacted the Equal Pay Act for State Services, which established the principle of equal pay for women within the public services.

however, garnered more publicity.[532] By 1973, there was talk of establishing a Women's Electoral Lobby (WEL), like that in Australia, in order to try to influence elections.[533] New Zealand's WEL was formed just prior to the 1975 election. Pressure from women's groups became a key element of subsequent campaigns throughout the 1970s as both of the main political parties tried to position themselves on an array of controversial social issues.

The National Advisory Council on the Employment of Women published its first report on the eve of the December 1972 election. The National Party pledged in the course of the 1972 election campaign that if returned to power it would incorporate into a proposed Industrial Relations Bill a provision outlawing discrimination against women in employment; and Prime Minister Holyoake reminded voters that it was a National government that had legislated against racial discrimination. The Labour Party, led by Norman E. Kirk, made tepid assurances concerning legislation against sex discrimination. Its connections with the trade unions made employment discrimination against women a sensitive issue. After twelve years of National Party rule, voters proved ready for a change, and Labour won the 1972 election with a surprising landslide. It carried fifty-five seats to National's thirty-two and received 48.37% of the vote.[534]

Legislation prohibiting discrimination against women was not forthcoming from the new Labour government, however, because of its strong ties to the unions, most of which vehemently opposed ideas of gender equality. The government abandoned a plan to incorporate a nondiscrimination provision into an Industrial Relations Bill because, according to Prime Minister Kirk, separate, more comprehensive legislation was being

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532 Women began entering those pubs and seeking service in Auckland and Wellington in 1970, see Dann, *Up From Under*, 6.

533 Sonja Davies, "I'll have to ask my husband" in Brian Edwards (ed.), *Right out Labour victory '72: the inside story* (Wellington: A. H. & A. W. Reed, 1973), 133-46, 144.

534 Brian Edwards, Brian, "There's always next time" in Brian Edwards (ed.), *Right out Labour victory '72: the inside story* (Wellington: A. H. & A. W. Reed, 1973), 3-15, 3; Barry Gustafson, *His way: a biography of Robert Muldoon* (Auckland: Auckland University Press, 2000), 130.

considered.[535] This inaugurated a period of governmental delays that the opposition sought to exploit for political gain. In March 1973, the National Party proposed amendments to the government's industrial relations legislation that would prohibit discrimination against women in employment, but those amendments were effectively killed by the Labour government. In 1972, David Thomson introduced a private member's bill, the "Women's Rights of Employment Bill,"[536] and the day following that bill's introduction, the Minister of Labour responded by giving notice that he was convening a special select committee on women's affairs.[537] That committee, known as the Women's Rights Committee, was established on 13 September 1973, and its work was described as evaluating "the attitude the nation took towards women in general, and their rights in every sphere of society."[538] Thomson's bill was promptly referred to that committee, where it sat as the committee engaged in protracted deliberations.[539] In 1974, Thomson again introduced a similar bill,[540] which the Minister of Labour again referred to the Women's Rights Committee, and W.L. Young—a National Party MP serving on the Women's Rights Committee—introduced a "Women's Rights of Employment Bill" into Parliament. The latter would have provided for a remedy by way of civil proceedings,[541] which prompted a negative reaction from Dorothy Jelicich. She observed that women should not be required to take a private civil action to obtain justice at their own expense, but rather they should be able to use a process similar to

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535 Norman Kirk responded to a question from David Thomson, 7 November 1977, 387 *NZPD* 4914.

536 Thomson, 389 *NZPD* 641.

537 Thomson, 389 *NZPD* 641.

538 Hugh Watt, 389 *NZPD* 643. The Committee was due to report back to the House on 5 March 1974, by which time it had received seventy-one items of evidence and heard three witnesses, with arrangements to hear a further twenty-seven witnesses. On that date, however, the Labour Government moved to extend the reporting date by nine months, to 30 November 1974.

539 The Committee was originally required to report back to Parliament on 5 March 1974. However, on that date, the government moved that it be accorded an additional nine months to continue its deliberations.

540 Thomson's second private member's bill differed from his previous measure in that would have bound the Crown and the State services, and it used different technical terms with regard to employment law, see 389 *NZPD* 642.

541 See Young, 401 *NZPD* 4787.

that set forth in the Race Relations Act.[542] Ironically, the only women in Parliament, Jelicich and Mary Batchelor, sat on the Labour benches and thus found themselves arguing the party line against these bills.

The Women's Rights Committee finally reported back to Parliament on 12 June 1975.[543] Publication of its report, The Role of Women in New Zealand Society, coincided with the International Women's Year conference in Mexico City. The Report recommended that a Women's Rights Commission be established to enforce antidiscrimination legislation.[544] As a result of the Labour government's delay, such legislation was again an election issue in 1975. Hoping to score votes among women and points with the newly established WEL, the National Party's 1975 manifesto promised the creation of a Human Rights Commission.[545] In a speech on 4 November 1975 that kicked off the 1975 election campaign, Robert Muldoon promised a Human Rights Commission, and the party's Manifesto pledged to "'introduce legislation to remove existing legal discrimination relating to women, and to prohibit discrimination against any person by reason of sex.'"[546] The Nationals prevailed at the election, but once in office they apparently lost their zeal for antidiscrimination legislation, for no such legislation was introduced for twelve months. As evidence of its own ambivalence towards such legislation, Labour Party MPs failed to bring

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542 401 *NZPD* 4796.

543 The Committee ultimately received 128 submissions from a variety of organizations and individuals and heard 143 witnesses (see Young, 401 *NZPD* 4786).

544 *The Role of Women in New Zealand Society*, Report of the Select Committee on Women's Rights (Wellington: Government Printer, 1975), 102.

545 Specifically, it provided: "'The National Party … intends to establish a Human Rights Commission—extending the office of the Ombudsman originally introduced by a National Government—to investigate complaints of inefficiency, maladministration and discrimination, and ensure that the exercise of power remains under continuous scrutiny. The HRC will be a body of Ombudsmen and will have the overall authority to investigate complaints laid against the Government departments and organizations, local organizations, industrial associations and unions, and complaints of discrimination on the grounds of race, sex or religion…. The HRC will include the present Ombudsman's jurisdiction and the currently proposed extensions to cover local government. Further, it will include investigation of malpractices in the management and conduct of industrial unions and associations'" (quoted by Finlay, 412 *NZPD* 2292).

546 Gustafson, *His way: a biography of Robert Muldoon*, 170.

this neglect to the public's attention in Parliament. Finally, on 9 December 1976, the National government introduced its Human Rights Commission Bill, and a Select Committee was established to study the bill

Table 4.2: Human Rights Commission Act Legislative Timeline

First Reading and referred Select Committee	9 December 1976
Second Reading	29 July 1977
Royal Assent	21 November 1977
Act enters into force	1 September 1978
Ratification of ICCPR	28 December 1978

The government's conception of a human tights commission was heavily influenced by its earlier institutional innovation, the Office of the Ombudsman, which it had established in 1960.[547] As a result, the proposed commission was described as a "body of ombudsmen" authorized to investigate complaints of inefficiency, maladministration, and discrimination lodged against central as well as local governments and industrial associations and unions.[548] In terms of its scope, it was to have jurisdiction to investigate complaints of unlawful discrimination and breaches of human rights on grounds of sex, marital status, and religious beliefs in such fields as public access to places, vehicles and facilities, the provision of goods and services, land, housing accommodation and financing the same, advertisements,

547 See Larry B. Hill, *The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment* (Princeton, N.J.: Princeton University Press, 1976).
548 Wilkinson, 396 *NZPD* 652.

employment, equal pay, inciting disharmony, and the membership of industrial unions or associations.

The Select Committee received more than 127 submissions, many of them from concerned individuals and academics.[549] Thirteen different women's groups filed submissions,[550] as did the United Nations Association of New Zealand and a group calling itself the Citizens Commission on Human Rights. In addition, four religious organizations appeared before the Committee.[551] Most of the submissions focused to some degree on the recognition of new protected grounds. In its original form, the Bill defined "marital status" to mean "the status of being single, married, married but separated, divorced, widowed, or living in a de facto marriage." It also included an exception that would have permitted landlords to refuse accommodations to couples that were living in de facto relationships. These provisions were the result of a compromise hatched within the National Party caucus. Both the definition of marital status and the exception generated considerable opposition from religious organizations on the one hand, and feminists and homosexual activists on the other. The former argued that the institution of marriage would be undermined by extending protection against discrimination to de facto couples and expressed concern that the language may be construed to accord legal protection to homosexual relationships. Liberal groups supported the broad definition of marital status, but they condemned the

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549 Between 23 February and 8 June, the Committee held thirteen meetings, taking a total of forty-five hours to hear fifty-five oral submissions.

550 These included Amnesty Aroha, Feminists for Life (Auckland), Hamilton Organisation for Women, WEL (Waikato), Women's Electoral Lobby (Auckland), Committee of Women, National Advisory Council on the Employment of Women, Women's Rights Policy-Working-Group of the New Zealand Values Party, Hamilton Feminists, National Organisation of Women (Auckland), Women's Electoral Lobby (Rotorua), Women's Electoral Lobby (Christchurch), Council for Equal Pay + Opportunity, and the Maori Women's Welfare League.

551 These included the Catholic Education Council for New Zealand, the Public Questions Committee of the Methodist and Presbyterian Churches of New Zealand, Presbyterian Social Service Association, and the Bible Society in New Zealand Inc.

exception. At this time, male homosexual conduct remained a criminal offense,[552] one that the state had a recent record of prosecuting.[553]

The Select Committee ultimately sought to appease conservative and liberal groups by removing both the definition of marital status and the exception from the Bill.[554] By omitting the definition, Thomson suggested that New Zealand was "following the Canadian precedent" and leaving it to the Human Rights Commission and the courts to resolve the issue.[555] Finlay, however, argued that failure to define the concept would create uncertainty, and require the courts to make law rather than simply interpret it.[556] In addition, the issue of religion also raised questions, such as whether the law's protections should apply to atheists and agnostics. In the interest of protecting these groups, "ethical belief"—defined as the absence of religious belief—was added as a prohibited ground of discrimination. The Committee rejected suggestions by some witnesses that gays and lesbians and individuals with learning disabilities be added as protected grounds.[557]

Likewise, suggestions that the Race Relations Act and the Human Rights Commission Act be consolidated were rejected. The Human Rights Commission Act was, however, "closely modeled on the complaint and conciliation procedures in the Race

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552 After years of lobbying, in 1974 Venn Young introduced into Parliament a private member's bill that would have decriminalized male homosexual behavior. It was considered by a select committee and underwent various amendments, but the Bill was denied a second reading on 8 July 1975 by a majority of five, see 399 *NZPD* 2829. In 1985, a private member's Bill introduced by Labour MP Fran Wilde would have decriminalized male homosexual conduct and amended the Human Rights Commission Act 1977 to add sexual orientation as a protected class with regard to employment, accommodation, and the provision of goods and services. As it was finally enacted, the Homosexual Law Reform Act 1986 decriminalized homosexual conduct between men over the age of sixteen, but did not recognize sexual orientation as a protected ground within the Human Rights Commission Act.

553 Between 1970 and 1974, thirty-three persons were convicted of sodomy, and 279 were prosecuted for "indecency between males," see 406 *NZPD* 2715.

554 See Finlay, 411 *NZPD* 1249.

555 411 *NZPD* 1476.

556 412 *NZPD* 2293.

557 See Submissions of the Intellectually Handicapped Children's Society and the Specific Learning Difficulties Group on the Human Rights Commission Bill.

Relations Act."[558] Unlike the Race Relations Act, it included two novel enforcement features. First, the commission was authorized to bring a class action on behalf of a group of persons allegedly suffering unlawful discrimination.[559] Finlay speculated that the Bill might prove "a powerful weapon against oppression" or it may prove "to be a charter for mischief-makers and stirrers—or for both."[560]

The creation of a special tribunal, called the Equal Opportunities Tribunal (EOT), to adjudicate discrimination complaints was a second innovation. Some Labour MPs considered the EOT an unnecessary bureaucratic development. During parliamentary debate, Jonathan Hunt, for example, argued that the tribunal represented "a serious departure from the fundamental constitutional principles" and threatened to erode "the independence and prestige of the judicial process. In his opinion, the interests of both parties to litigation would be best protected by allowing courts to adjudicate complaints, and public awareness of the new law would be better advanced if it were enforced through the courts rather than through a tribunal.[561] During its deliberations, the Select Committee sought to tie the tribunal into the court system through several proposed amendments. First, it limited the jurisdiction of the tribunal to hearing claims for damages of $3,000 or less, the same figure that applied to magistrates' courts. A second amendment provided for appeals to the Supreme Court on matters of fact as well as law, including the right to a complete rehearing of the issues. The latter change, Thomson suggested, meant that there would be comprehensive judicial supervision of the EOT's rulings,[562] but Hunt countered that it constituted needless duplication of tasks and therefore wasted expenditures. The courts also offered their own suggestions with regard to the new tribunal. Through a

558 Thomson, 408 *NZPD* 4688.
559 Thomson, 408 *NZPD* 4688. Human Right Commission Act 1977, §38(2).
560 408 *NZPD* 4689.
561 Hunt, 413 *NZPD* 2391.
562 Thomson, 411 *NZPD* 1476.

submission to the Select Committee, the Royal Commission on the Courts proposed that where a court hears an appeal on the facts against a decision of the EOT, the judge should be assisted by two members of the Tribunal who did not participate in the decision against which the appeal is sought. The government adopted the proposal, believing that it would ensure that complaints of discrimination were heard by persons with expert knowledge in antidiscrimination law.

More controversial was the National Party's proposal to empower the Human Rights Commission to investigate industrial disputes. The party had a longstanding antipathy towards New Zealand's powerful trade unions. Prime Minister Robert Muldoon knew that Labour would oppose this part of the Bill on grounds that it undermined the existing regime governing employment relations and posed a threat to the unions. He included it in order to complicate Labour's position on the Bill. Labour MP Allan M. Finlay said that he could "think of nothing more dangerous than setting an Ombudsman-like character loose on the industrial scene."[563] He argued that industrial mediators were better suited to resolving these types of workplace disputes. As a result, Labour could only support the Human Rights Commission in part.

To a lesser extent, MPs debated the appropriate relationship the Human Rights Commission Bill should have, once enacted, to other statutes. Labour MP Finlay, for example, faulted the Bill because it failed to limit or affect the provisions of any other Act.[564] Barry Brill, however, noted that a schedule appended to the Act identified legislation that the Act would affect. If there was other legislation, then Finlay should bring it to Parliament's attention, "rather than contending that the Bill could override every Act on the statute book."[565] Towards the goal of ending *de jure* discrimination, the Bill authorized the HRC to

563 396 *NZPD* 668.
564 415 *NZPD* 4128.
565 415 *NZPD* 4130; see also Thomson, 408 *NZPD* 4688.

work towards and report to the prime minister from time to time on progress being made towards the repeal or amendment of provisions in any enactment that conflict with the Act's prohibitions against discrimination and the elimination of discriminatory laws and practices that infringe the spirit and intention of this Act.[566] Finlay unsuccessfully moved that those reports be issued to Parliament rather than the prime minister.[567]

Several participants in the debates recognized, to varying degrees, that they were engaged in an effort of fundamental importance that was fraught with trade-offs. National MP Edward G. Latter, for example, acknowledged the inherent difficulty in legislating "to create equal rights for all," for in do doing, "the so-called or assumed rights of other people are invariably taken from them." He, therefore, cautioned that Parliament should "proceed slowly with this legislation."[568] Nevertheless, a self-described "stodgy righty," Latter supported the Bill, alongside the "'trendy lefties'" and "'trendy lawyers,'" because he thought it was "inevitable" and part of a global trend.[569] Labour MP David Lange disapprovingly observed that various "right-wing" groups had appeared before the Select Committee, explicitly seeking to preserve a right to discriminate. According to Lange, these groups argued that "any protection against discrimination meant that we were placing a fetter on those who would wish to have the license to discriminate, and to pick and choose, on the basis of prejudice or bias."[570] Brill expressed concern that many New Zealanders misunderstood the legislation, and so he reassured them that they would "still be entitled to cherish their favorite prejudices," such as those "against persons with red hair, persons with certain mannerisms, persons without hair, and people who do not appeal for one reason or another." The Bill is not, Brill explained, "an overall abrogation of the right of people to

566 Human Rights Commission Act 1977, §5(e).
567 415 *NZPD* 3978.
568 412 *NZPD* 2295.
569 412 *NZPD* 2295; 411 *NZPD* 1255.
570 411 *NZPD* 1253.

have likes and dislikes, to have prejudices, or to cherish their own views," for only "[a] narrow range of grounds" was proscribed.[571] Chief Ombudsman and former Race Relations Conciliator, Powles noted that the Bill "covered a very sensitive area and, by its nature, would impinge on the rights of individuals, there being no strong and clear consensus on what those rights actually are."[572] MP Colleen E. Dewe, of the National Party, acknowledged that the Bill required the suppression of "people's natural prejudices … so that there can be a greater consciousness of the need for concern for others," but she asked, "how far can any government go in restraining and restricting people's prejudices?" She was particularly "troubled" by that prospect because many were advocated that the Bill should protect against discrimination on grounds of sexual orientation, which she felt was "still alien to the way of life of most of us."[573]

As it was finally enacted, the Human Rights Commission Act, like the Race Relations Act, provided for litigation as a last resort if efforts at conciliation failed. Education served as the primary role of the Commission in its daily operations. As a result, the introduction of class actions and the creation of the EOT, although innovations, were of little significance. During the 1980s, the Muldoon government revisited the legislation on two occasions, the first time to create a new exception for discriminatory conduct and the second time to restructure the lines of authority within the Human Rights Commission. It was motivated by a desire to constrain rather than expand the country's antidiscrimination regime.

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571 412 *NZPD* 2290.
572 412 *NZPD* 2301.
573 412 *NZPD* 2301.

AMENDMENTS TO THE HUMAN RIGHTS COMMISSION ACT

In 1981, the EOT heard the case *Robinson v. Eric Sides Motors, Ltd.* There, a business advertised in *The Press* and the *Christchurch Star* for a "keen Christian person" to fill a vacancy for a petrol station attendant, and an applicant claimed that he had been denied the position on account of his religious beliefs. Two issues were presented for determination. First, had the newspapers breached the Human Rights Commission Act's prohibition against discriminatory advertising? And second, had Eric Sides Motors engaged in employment discrimination as alleged? The case drew considerable media attention and raised a public outcry because it was well-known that freezing companies were permitted to hire Muslims exclusively as mutton slaughterers for the Iranian market in order to satisfy Islamic requirements.[574] The HRC's hoped that a decision against the newspapers would convince recalcitrant editors, many of whom regarded the Human Rights Commission Act as an unreasonable infringement on their operations, to stop printing discriminatory advertisements.[575]

The EOT issued an uncharacteristically lengthy opinion in the case, finding that both Eric Sides Motors and the newspapers had breached the Act's provision against discriminatory advertising. Although a restraining order was issued against Eric Sides Motors to refrain for future discriminatory advertising and costs were awarded against all three defendants, a restraining order against the newspapers was not considered necessary in light of their assurances that they would abide by the law.[576] This was hardly a demonstration of strength by the EOT. With regard to the employment decision, the Tribunal decided that while the religious issue was a factor in the decision, it may not have

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574 See Human Right Commission, *Annual Report* (Wellington: Government Printer, 1980), 24.
575 See Human Right Commission, *Annual Report* (Wellington: Government Printer, 1980), 20, 25.
576 See Human Right Commission, *Annual Report* (Wellington: Government Printer, 1981), 53.

been "'a substantial and operative factor.'"[577] It gave "the benefit of the doubt'" to Eric Sides Motors, and found against the plaintiff.[578]

Despite the outcome of the case, four months later Attorney-General and Minister of Justice J.K. McLay introduced the Human Rights Commission Amendment Bill into Parliament. He argued that New Zealanders clearly wanted an employer to have "at least some capacity to prefer his co-religionists as employees when particular circumstances make it reasonable to exercise such a preference."[579] Rather than rescind the words "religious or ethical belief" from the employment section, which McLay believed might be interpreted to mean that the Government no longer opposed discrimination on those grounds, a new exception was created. The amendment provided that if an employer could show special circumstances governing the way in which an employee was required to execute the duties of a particular position, and if those special circumstances made it reasonable for the employer to prefer an employee of the same beliefs as himself, then it would not be unlawful for the employer to advertise for, and employ, such a person in preference to applicants.[580] Notably, the government pursued this amendment without consulting the HRC's Chief Commissioner, Pat Downey.[581]

Labour MP Mary Batchelor empathized with McLay. She stated that since sitting on the Select Committee that considered the Human Rights Commission Act she had recognized the difficulty in giving "one section of the community its human rights without affecting the human rights of other sections of the community in some way."[582] Noting that the National Party was purportedly committed to guarding against the expansion of the state

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577 Human Right Commission, *Annual Report* (Wellington: Government Printer, 1981), 53
578 Human Right Commission, *Annual Report* (Wellington: Government Printer, 1981), 53
579 440 *NZPD* 3032.
580 440 *NZPD* 3032.
581 *Evening Post* (25 August 1981), p. 5.
582 440 *NZPD* 3032.

vis-à-vis society, Batchelor questioned why the government was not using this as an opportunity to reexamine the Human Rights Commission Act on this point.[583] She suggested that the HRC be given "greater powers to investigate the expansion of governmental and administrative powers."[584] No such action was taken, however, and the proposed amendment was adopted.

Two years later, the government sought further amendments to the Human Rights Commission Act. Prime Minister Muldoon was dissatisfied with the way in which the HRC had been run under the leadership of its Chief Commissioner, Pat Downey. Downey had opposed New Zealand's continued sporting contacts with South Africa, bringing it into direct conflict with government policy. In addition, he had taken a hard line against the newspapers, insisting on nondiscriminatory employment advertisements with regard to gender. This, of course, was consonant with the law. Downey's position nevertheless riled a number of editorial boards, which used their position to publicize any trivial complaints pursued by the Commission and generate considerable bad press. Until the 1983 amendments, the Commission had lacked the power to dismiss trivial complaints without an investigation, and this involved it in many issues that it might not have otherwise pursued.

Muldoon wanted to bring respectability to the Commission and also curb what he perceived to be its radical tendencies. He sought to accomplish this by appointing John Wallace, a respected High Court judge and former head of the EOT, to serve as the Commission's new Chief Commissioner. Wallace, however, wanted to keep his judicial appointment. This posed a problem, for as Chief Commissioner, Wallace would participate in deciding which complaints to pursue before the EOT and ultimately the courts. In order to avoid the appearance of impropriety, creation of a Proceedings Commissioner was

583 440 *NZPD* 3033.
584 440 *NZPD* 3033.

proposed.[585] According to the amendments, if conciliation of a complaint failed, the complaint could be referred to the Proceedings Commissioner, who possessed sole authority to determine whether civil proceedings would be pursued.[586] This would severe the Chief Commissioner from any decision making concerning litigation in the courts. The Proceedings Commissioner was also given new litigation powers. First, he was empowered to seek declaratory judgments, pursuant to the Declaratory Judgment Act 1908, from the High Court.[587] And second, the Proceedings Commissioner was empowered to appear, with a right to adduce evidence and cross examine witnesses, in any proceedings before the EOT or any proceedings that had at one time been before the EOT.[588] By exercising that prerogative, the Proceedings Commissioner could obtain a costs award either for or against him.[589] Although the 1983 amendments were born of an effort to reign in the HRC, they created a new position that at least had the potential to make greater use of the courts.

THE HUMAN RIGHTS ACT 1993

From the very inception of New Zealand's antidiscrimination regime in 1971, there has been pressure to expand its protections to additional groups. Various organizations claiming to represent the interests of gays and lesbians and the disabled lobbied for such legal protection over the ensuing decades. In the early 1990s, Parliament grappled with the issue of including those groups and with the application of antidiscrimination to government activities.

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585 Personal interview with a former member of the Human Rights Commission, 1 October 2004.

586 Human Rights Commission Amendment Act 1983, §11. If the Proceedings Commissioner declined to proceed to the EOT, then the aggrieved person could initiate his own proceedings, see Human Rights Commission Amendment Act 1983, §12.

587 Human Rights Commission Amendment Act 1983, §3.

588 Human Rights Commission Amendment Act 1983, §13.

589 Id.

In 1979 and again in 1980, an organization calling itself the National Gay Rights Coalition approached the Human Rights Commission about securing protection against discrimination on grounds of sexual orientation and the decriminalization of male homosexual conduct.[590] The Coalition argued that "being a homosexual amounted to having a 'status' in terms of international instruments on human rights," but the Commission rejected the analogy between homosexuals and other groups, such as those identified in terms of race, color, sex, language, or other terms used in international instruments. The Human Rights Commission did, however, accept that there was a need to amend the criminal law as it applied to gay men. It recommended amending the criminal law but leaving the antidiscrimination legislation intact.[591]

By the mid-1980s, disability groups were also pressing for law reform. In 1985, a Task Force on the Revision of Mental Health Legislation was found that the mentally disabled were one of the "poorest and most powerless groups in the country."[592] In that same year, the New Zealand Parliament was considering adopting a bill of rights. The original proposal did not recognize disability as a protected ground because it was believed that inclusion would involve too great a cost. Various disability rights groups, including the Advisory Council for the Community Welfare of Disabled Persons and the New Zealand Society for the Intellectually Handicapped (Incorporated), argued before the Select Committee on the proposed Bill of Rights, that any bill of rights should include disability as a protected ground.[593] They also argued that the Human Rights Commission Act be

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590 Human Rights Commission, *Annual Report* (Wellington: Government Printer, 1981), 10.

591 Human Rights Commission, *Annual Report* (Wellington: Government Printer, 1981), 11.

592 Task Force on the Revision of Mental Health Legislation, *A Bill of Rights for New Zealand—Submissions to the Justice and Law Reform Committee* (December, 1985), 4.

593 Advisory Council for the Community Welfare of Disabled Persons, *Submissions on the Proposed Bill of Rights to the Justice and Law Reform Committee* (December, 1985), p. 6; New Zealand Society for the Intellectually Handicapped (Incorporated), *Submissions on the Proposed Bill of Rights to the Justice and Law Reform Committee* (December, 1985), p. 6.

amended to include disability. Neither of their demands was met. A statutory bill of rights was adopted in 1990,[594] but it did not protect individuals against state discrimination on grounds of disability.

The National Party government of Prime Minister James Bolger introduced the Human Rights Bill into Parliament on 15 December 1992. National Party MP Katherine O'Regan, who served as the Associate Minister of Health and Minister of Consumer Affairs, successfully moved to amend the Human Rights Bill to add sexual orientation as a protected ground as well as individuals afflicted with "organisms in the body capable of causing illness as grounds." Thereafter, the Bill was promptly referred to the Justice and Law Reform Committee. Over the course of the next six months, the Committee received 700 substantive submissions, 640 of which dealt solely the issue of recognizing sexual orientation as a protected ground. Of those, 497 supported the addition of sexual orientation and 142 were opposed. The Committee also received over two thousand form submissions in support of adding both controversial grounds. Because the two main political parties were as divided as New Zealand society, both Labour and National agreed to allow their members a conscience vote on the inclusion of these two new grounds.

Table 4.3: Human Rights Act Timeline

First Reading and referred to the Justice and Law Reform Committee	15 December 1992
Justice and Law Reform Committee reported back to Parliament	22 July 1993
Entered into Force	1 February 1994

[594] See the New Zealand Bill of Rights Act.

For some, such as Labour MP Steve Maharey, the Human Rights Bill was about citizenship. He argued that citizens of New Zealand ought to enjoy "a series of rights," including "the rights to have a job, to rent a house, and to have access to public places."[595] The Minister of Justice, Douglas Graham also emphasized the Bill's symbolic functions. Antidiscrimination laws were, he reasoned, not really punitive but rather constituted an effort "by Parliament to send a signal that certain behavior is unacceptable." Graham accepted that "there will always be cases in which people feel that [antidiscrimination] laws impinge on their own individual rights,"[596] but he countered that the Bill would be "instrumental in the effort towards achieving a fully integrated, harmonious, and just society."[597] By contrast, John Robertson, also a National Party MP, conceived of the legislation in terms of a struggle over the issue of the appropriate role of the state in society and the very concept of liberty.[598] He argued that New Zealand did not need to legislate further in order to prevent the prejudice of a few individuals, and contended that there was no evidence that antidiscrimination laws change attitudes. Invoking the thinking of John Locke and John Stuart Mill, Robertson sought:

> to remind members that this Parliament in its appetite to legislate is in danger of replacing the disciplines and the standards that healthy societies can and do naturally develop, with, instead, the heavy hand of the State as represented by the law and its accompanying costly bureaucracy.[599]

The Human Rights Act was enacted into law in February 1994, over a year after its introduction into Parliament. It made several changes in the regime's enforcement structure. The EOT was renamed the Complaints Review Tribunal (CRT). The Proceedings

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595 536 *NZPD* 16746.
596 537 *NZPD* 16961.
597 532 *NZPD* 13204.
598 536 *NZPD* 16745.
599 536 *NZPD* 16921

Commissioner retained the powers set forth in the 1984 amendments and received several others. The Proceedings Commissioner could apply to the CRT for an interim order,[600] and he could issue a summons requiring a person to attend a conciliation conference convened by the Complaints Division.[601] In addition, he could decide whether to institute proceedings against a party to a previous settlement who has not lived up to the terms of that settlement.[602] The Race Relations Conciliator continued to administer the provisions against racial discrimination, but he became a member of the HRC, "principally to provide collegial support."[603] The Conciliator's responsibilities were brought into line with those of the Human Rights Commissioners in that he was charged with educating, conducting inquiries, making public statements, producing guidelines, and reporting to the prime minister. These changes, the Conciliator suggested, "more clearly and formally recognized the importance of education in promoting positive race relations for the first time."[604] Reflecting the importance of international considerations, the Conciliator was also given the right to comment on New Zealand's performance on race matters to international forums.

Both the Race Relations Act and the Human Rights Commission Act contained provisions that rendered them subordinate to other statutes. Thus, courts could not declare legislation invalid on grounds that it contravened these laws. The Human Rights Act of 1993 contained a similar provision, as well as a provision that exempted the government from compliance with the new protected grounds that were introduced in the Act. This latter provision was subject to a sunset clause, thus it would lapse on 31 December 1999. It was expected that the government would ensure that existing laws and policies complied with the Act by that date. In furtherance of that goal, the Human Rights Commission was

600 Human Rights Act 1993, §§82(1)(a), 95(2).
601 Human Rights Act 1993, §§80(3), 82(1)(b).
602 Human Rights Act 1993, §§82(1)(b), 81(2).
603 Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 2001), 5.
604 Office of the Race Relations Conciliator, *Annual Report* (Wellington: Government Printer, 2001) 8.

charged with examining all government acts, practices, and policies and identifying any conflicts, which the government was expected to rectify. This audit, however, proved so costly and time-consuming that the Bolger government proposed making the exemption permanent, for which it drew heavy political fire from Labour and human rights groups. As a compromise, the exemption was extended for an additional two years, until 31 December 2001.

Chapter Five: Australia

Australia's federal antidiscrimination regime today protects against discrimination on eight different grounds. They are: race, color, national and ethnic origins, sex, marital status, pregnancy or potential pregnancy, disability, and age. The state of South Australia enacted the first law prohibiting racial discrimination in 1966. The federal government followed suit in 1975, but it used an administrative approach rather than the criminal one used by South Australia. No further antidiscrimination legislation was enacted at the federal level until the Sex Discrimination Act in 1984. Two years later, the Human Rights and Equal Opportunity Commission was created, and it was assigned responsibility for enforcing both federal antidiscrimination laws. In 1992, the federal government enacted the Disability Discrimination Act. In contrast to New Zealand, the Labor Party pioneered antidiscrimination laws in Australia, and four of the country's five main federal laws were enacted under its stewardship.

The political development of antidiscrimination laws in Australia was complicated by two main factors. First, and most importantly, Australia is a federal system governed by a written constitution that prescribes the authority belonging to the state and federal governments. Historically, the states have jealously guarded their constitutional powers and prerogatives against federal encroachments. Australia, like the U.S., has a bicameral parliament with an upper chamber in which representation is allocated by state. In 1949, proportional voting for the Senate was introduced by a Labor government that believed the new system would favor its electoral fortunes. In fact, the change never worked to the party's benefit, and as I will show, it has had significant consequences for the political system, as well as for the adoption of antidiscrimination legislation.

Second, Australian thinking about law and liberty was heavily influenced by "liberalism's focus on the individual's freedom from government action,"[605] and thus, it was believed that the best law was the least law.[606] It was thought by many political elites—particularly those belonging to Australia's two main conservative parties, the Liberal Party and the National Party—that the common law offered all the legal protection that was needed. Robert Menzies, who served as prime minister from 1949 through 1966, exalted the common law, as did Sir Owen Dixon, Chief Justice of the High Court.[607] By the early 1970s, however, a sole reliance on the common law was under attack. C.G Weeramantry describes the conflict as "a cultural and ideological clash" between "the methods and values of the British constitution and the methods and values of the international human rights discourse."[608]

Before Australia's constitution took effect in 1901, its framers had considered and rejected the inclusion of various rights-protection provisions. At the Constitutional Convention in Melbourne in 1897-98, Andrew Inglis Clark proposed the following amendment:

> a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[609]

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605 Williams, *Human Rights under the Australian Constitution*, 6.

606 Campbell and Whitmore, *Freedom in Australia*, 1.

607 See Robert G. Menzies, *Central power in the Australian Commonwealth : an examination of the growth of Commonwealth power in the Australian Federation* (London: Cassell, 1968); Sir Owen Dixon, *Jesting Pilate and other papers and addresses* (Melbourne: Law Book, 1965).

608 C.G. Weeramantry, "Cultural and Ideological Pluralism and Contemporary International Public Law" in *Law and Australian Legal Thinking in the 1980s: A Collection of the Australian Contributions to the 12th International Congress of Comparative Law*. Held at the Law Schools of the University of Sydney and Monash University, Melbourne, 18-27 August 1986, 405-475, 445.

609 *Convention Debates 1891-1898: commentaries, indices and guide. Official record of the debates of the Australasian Federal Convention* (Sydney: Legal Books, 1986),Vol. 4 (Melbourne, 1989), 667. See also J.A. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972).

This amendment and others like it were decisively rejected as a result of the framers' beliefs about the efficacy of common law and the institutions of responsible government in protecting citizens' civil and political liberties. In addition, the framers were motivated by their desire to create and maintain a white Australia.[610] To that end, they drafted constitutional provisions that would enable the States to maintain their racially discriminatory laws towards Australia's indigenous populations.[611] Section 51 (xxvi) of the Australian Constitution—known as "the races power"—permitted the federal parliament to pass laws with respect to "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws." Section 51 was not amended until 1967.[612] Section 127 provided that Aboriginals were not to be counted as part of Australia's population. A restrictive immigration law was among the new Parliament's first acts. Mark McKenna thus contends that "federation was contingent upon racial discrimination," for "the racial superiority of white British stock" served as a unifying force.[613] Moreover, as Peter Bailey observes, it was not "only a belief in the potential of democracy that prompted the founders to eschew broad statements of rights. As participating politicians, many were aware of the potential dangers of provisions preventing discrimination on grounds of race and promoting equality."[614]

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610 Marilyn Lake, "White Man's Country: The Tran-National History of a National Project," 34 *Australian Historical Studies* 34 (October, 2003), 346-364.

611 Williams, *Human Rights under the Australian Constitution*, 41-43; McKenna 1996-97. For examples of racial motives, see *Official Record of the Debates of the Australian Federal Convention: 1891-1898* [hereafter *Convention Debates*], vol. 5, Melbourne 1898 (Legal Books, 1986), p. 1784, 1752 and *Convention Debates*, vol. 4, pp-665-688 (debate on clause 110).

612 It was amended by a referendum on 27 May 1967 at which 89.34% of voters supported it. See B. Attwood and Andrew Markus, *The 1967 Referendum, or When Aborigines Didn't Get the Vote* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997).

613 McKenna 1996-97: 15. For a flavor of these sentiments as expressed during the constitutional debates, see *Official Record of the Debates of the Australian Federal Convention: 1891-1998* [hereafter *Convention Debates*], Vol. 5, Melbourne 1898 (Legal Books, 1986), pp. 1784, 1752; and, *Convention Debates*, Vol. 4, pp. 665-688.

614 Peter Bailey, *Human Rights: Australia in an International Context* (Sydney: Butterworth's, 1990), 51.

1945-1975: WHY NO FEDERAL ANTIDISCRIMINATION LAWS?

The Australian Labor Party (ALP) controlled the Commonwealth Parliament from 1941 through 1949. It was a social democratic party with deep roots in the trade union movement. Ideologically, the ALP was committed to consolidating political power at the Commonwealth level for purposes of economic control and social reform, which often placed it at odds with a federal system designed to limit the Commonwealth Parliament's powers vis-à-vis the states. In addition to the prevailing racialist *zeitgeist*, the ALP's close ties to organized labor translated into strong support for racially exclusionary immigration policies—commonly known as "White Australia"—which were intended to preserve honest wages for white working men. Those policies also rested upon racist ideas about white superiority. Consequently, despite the participation of high-ranking ALP officials in various UN bodies—most notably H.V. "Doc" Evatt, who served both as Attorney-General and Minister for External Relations during the late 1940s—there was no federal effort to pursue antidiscrimination laws during Labor's postwar rule.[615]

In 1949, the newly formed Liberal Party, led by Robert Gordon Menzies, gained control of the House of Representatives. Thereafter, a coalition of the Liberal and the Country Parties[616] (hereafter "the Coalition") governed federally until 1972, and Menzies remained prime minister until his retirement in 1966—an astounding seventeen year tenure. The Coalition captured control of the Senate in 1951 and it controlled a majority of that chamber's seats until the 1970 election. Between 1959 and 1965, the Liberal and Country parties held power in four of the six states, thus "it appeared to be a Liberal era throughout

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615 Evatt played an active role at the UN conference in San Francisco in 1945 he led Australia's UN delegation between 1946 and 1948, and he served as President of the UNGA between 1948 and 1949. See David Day, ed., *Brave New World: H.V. Evatt and foreign policy, 1941-1949* (St Lucia, Qld.: University of Queensland Press, 1996); Ken Buckley, Barbara Dale & Wayne Reynolds, *Doc Evatt: p atriot, internationalist, fighter and scholar* (Melbourne : Longman Cheshire, 1994).

616 The Federal Country Party changed its name to the National Country Party of Australia on May 2, 1975. It underwent another name change on October 16, 1982, when it became the National Party of Australia.

most of the nation."[617] Between 1966 and 1972, the year that the Coalition lost its hold on the federal government, four of Australia's six states continued to be controlled by the coalition parties; and, for a brief period between 1969 and 1970, all of them were. This is not, however, to imply that organizationally the coalition parties were tightly controlled from the center, for the Liberal Party has historically been known for its decentralized structure.[618] Rather, the Coalition's electoral dominance demonstrated the salience of a particular set of values and a dearth of institutional opportunities for reformers to pursue.

Menzies personified Australia's white, British identity, and his leadership embodied the prevailing 1950s and 1960s ethos. According to Arthur Calwell, who served as federal leader of the ALP from 1960 until 1967:

> Sir Robert Menzies' importance to the Liberal Party cannot be overestimated. He founded the Liberal Party. He wrote its platform. He moulded its attitudes and philosophies. He was the Liberal Party.[619]

Together, the Coalition parties represented Australia's principal conservative interests, namely, mining companies and pastoralists. The Liberal Party, in particular, has been "the self-professed champions of individualism, suspicious of state power and defenders of the federal system."[620] The Country Party, a product of political mobilization among farm organizations in the early 1900s, dominated the rural electorates. Like the ALP, both parties, endorsed White Australia and there was, thus, a cross-party consensus that lasted through the late 1960s. In addition to trade union concerns, Australians generally feared the large

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617 Dean Jaensch, *The Liberals* (St. Leonards, NSW: Allen & Unwin, 1994), 38. Queensland was governed by the Country Party from 1957-1988; South Australia was governed by a non-Labor party until 1965; Victoria was governed by a non-Labor party from 1955-1982; and Western Australia was governed by a non-Labor party from 1959-1971.

618 K. West, *Power in the Liberal Party* (Melbourne: Longman, 1965), 261; Jaensch, *The Liberals*, 9, 40

619 Quoted in Jaensch, *The Liberals*, 37-38; see also West, *Power in the Liberal Party*, 17.

620 Brian Galligan, *A Federal Republic: Australia's constitutional system of government* (Cambridge: Cambridge University Press, 1995), 136.

Asian populations located to their north This fear had been made concrete by Japanese bombings of Darwin in 1942 and 1943, which killed over two hundred people.

With Menzies' retirement in 1966, the Liberal Party entered a period of instability, manifested in the succession of five different leaders during the next ten years. Harold Holt, Menzies' immediate successor, disappeared in the surf at Cheviot Beach, Victoria in December 1967.[621] The three Coalition ministries of Holt, John Gorton, and William McMahon have been described as "unhappy, unsuccessful and responsible for a decline in Liberal Party support not seen since the party's foundation."'[622] When Menzies had become prime minister in 1949, Australia's links to Britain were strong, and the newly created UN was dominated by Western powers. But by the time of his retirement in 1966, the UN's membership had swelled as a consequence of decolonization, and race had become an increasingly vexed international issue.[623] In that context, Australia's position as a white nation situated on the edge of Asia became a source of discomfort instead of pride, and Australian diplomats feared that international attention to the dismal state of the country's indigenous populations would result in the country being treated, as was happening to South Africa.[624]

As a result of these developments and fears, plus the Coalition's new leadership, in October 1966, only ten months after Menzies' retirement, the Holt Government signed the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which had been opened for signature by the UN in March of that same year.

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621 Country Party Leader, John McEwen, took over as Prime Minister in December 1967. When the Liberal Party elected John Gorton as its Leader, McEwen relinquished the Prime Ministership. The first McEwen/Gorton Ministry was sworn in from 10th January, 1968.

622 James Jupp, *Party Politics: Australia 1966-1981* (Sydney: Allen & Unwin, 1982), 49; see also Weller and Smith 1977: 52-54.

623 See Chapter Three, infra.

624 Jennifer Clark, "'The Wind of Change' in Australia: Aborigines and the International Politics of Race, 1960-1972," 20 *The International History Review* 89-117.

Signing the convention, however, was only half the battle because the Australia's treaty-making process is governed by two unwritten rules. According to the first rule, which was initiated by Menzies in 1961, the texts of treaties must be tabled in both houses of Parliament for at least twelve sitting days before the executive can ratify or accede to them. The second rule is that any changes to domestic law that are required in order to ensure treaty compliance must be made, usually by Parliament, before executive ratification.[625] Despite signing the ICERD, a series of Coalition governments were unable, or unwilling, to ratify it.

This failure may be attributed to a combination of constitutional and political considerations. The Australian Constitution accords the federal government a limited set of powers, and the power to enact laws prohibiting race discrimination was not among them in 1966.[626] The government could enact antidiscrimination legislation that applied to federal entities, but legislation that applied to the states could only be based upon the "external affairs power," found in Section 51(xxix). Apart from amending the Constitution, which is extraordinarily difficult,[627] the external affairs power presented one potential source of federal action against discrimination.[628] However, use of that power to enact antidiscrimination legislation would have constituted an expansion of federal power vis-à-vis the states. Given the coalition's commitment to states' rights, it was naturally reluctant to

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625 Kinley 1995: 62-63.

626 It was not until 1967 that the language in §51(xxvi) was repealed (see note 495). Moreover, according to George Williams it remains "unclear" whether the 1967 referendum "gave the federal Parliament the power to legislate for the benefit as well as the detriment of Aboriginal people." Although this very point was presented to the High Court in *Kartinyeri v. Commonwealth* (1998) 152 ALR 540, the Court failed to resole the issue, see Williams, *Human Rights Under the Australian Constitution*, 252-53.

627 The Australian Constitution provides only one means by which the document may be amended. According to §128, a referendum proposal must first be passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice. Then, it must be approved by a majority of voters, *and* by a majority of voters in a majority of the States (in other words, in at least four of the six States). As a result of this onerous process, of the forty-two proposals put to the Australian people, only eight have been passed.

628 Australian Constitution, §51(xxix).

take such action. The government instead negotiated with recalcitrant state representatives on several occasions, but to no avail. In order to rationalize this failure to enact national legislation, Coalition members articulated a strained interpretation of the ICERD. Although the terms of the convention expressly stated that signatories would enact legal protections against racial discrimination, they insisted that compliance simply required the repeal of racially discriminatory laws and policies. This interpretation appeared in subsequent debates on race discrimination legislation in 1975. Senator Ivor Greenwood, for example, argued that previous Liberal governments had interpreted ratification of the ICERD as merely imposing a "duty" upon all signatories to ensure that their laws were "not contrary to its broad principles." In Greenwood's words,

> Liberal governments following the acceptance of this Convention in 1966 sought to have adopted by the States laws which were consistent with the broad principles and sought to remove from the statute book laws which were inconsistent with its principles, and in that respect there was a great measure of success. I think it has to be recognized today that there are few, if any, laws still remaining in this country which could be regarded as laws which involve racial discrimination.[629]

Considering the states' general intransigence on the issue, this was a politically expedient interpretation.

Within the ALP a new generation of members joined the federal caucus after the 1961 elections. Throughout the late 1960s, a growing cadre of reformers – E. Gough Whitlam, Lionel Murphy, and Don Dunstan foremost among them – assumed greater influence in the party. In 1963, Cyril Wyndham became the party's first full-time federal secretary and head of its new permanent secretariat in Canberra. He replaced F.E. Chamberlain, who had epitomized the "backward-looking, machine-dominated and trade-union-based party" of the 1950s and early 1960s.[630] Wyndham and Whitlam led the reform

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629 *Race Discrimination Bill 1975*, Second Reading Speech, Senate *Hansard*, May 15, 1975, pp. 1516-17.

630 Brian Galligan, *A Federal Republic*, 147.

effort against old stalwarts like Arthur Calwell, who was party leader from 1960 until he was replaced by Whitlam in 1967. Organizational reforms within the party in 1964 ultimately translated into an array of new policies that were accepted at the Federal Labor Conference in 1965.[631] By 1969, the party had amended its platform in order to support the enactment of federal anti-discrimination legislation and the implementation of international human rights instruments.

Under Whitlam's leadership, the ALP deliberately used Parliament, in particular questions on notice, as part of its strategy to highlight the shortcomings of the Coalition government. Labor MPs invoked international ideas and standards in order to portray the Government as parochial and out of step with the times. In September 1971, for example, Senator Lionel Murphy questioned the government on its plan for addressing racial issues in light of the International Year for Action to Combat Racism and Racial Discrimination. Senator R.C. Wright responded that the government interpreted its responsibility under the ICERD to require the removal of discriminatory legislation from state and federal statute books, as opposed to enacting antidiscrimination laws.

During the 1960s, elements of civil society also clamored for reform. Borrowing from the tactics of American civil rights activists, in 1963 Aboriginal activist Charles Perkins orchestrated "freedom rides" through outback New South Wales towns, targeting clubs and swimming pools with racially discriminatory policies.[632] Aboriginal Australians, often in conjunction with non-indigenous allies, had a long history of seeking reforms, but by the late 1960s changes in the international context and within the ALP crated new political

631 See Paul Kelly, Paul, "Caucus under Whitlam: 1967-75" in Faulkner, John and Stuart Macintyre (eds.), *True Believers: The Story of the Federal Parliamentary Labor Party* (Crows Nest, NSW: Allen and Unwin, 2001), 105-121.

632 See Charles Perkins, *A Bastard Like Me* (Sydney: Ure Smith, 1975), and Ann Curthoys, *Freedom Rides: a freedom rider remembers* (Crows Nest, NSW: Allen & Unwin, 2003).

opportunities.[633] New and more aggressive indigenous organizations emerged.[634] Reminiscent of developments in the U.S., by the 1970s Aboriginal activism acquired a more militant tone. In January 1972, for example, the *Sydney Morning Herald* characterized a local "Black Power organization" as "a loose grouping of radical Aborigines who have introduced a new note of impatience to Aboriginal rights protests in recent months."[635] That same year, Aboriginal protestors set up an "Aboriginal embassy" on the grounds of Parliament House in order to protest the federal government's failure to recognize traditional native land rights. This, according to the *Sydney Morning Herald*, "undoubtedly signal[led] the emergence of Australia's black minority as their own pressure group."[636]

Some indigenous activists spoke out in favor of antidiscrimination legislation. For example, Black Power member Michael Anderson indicated that though his group had not yet worked out a list of demands, "'one of them might be for an anti-discrimination law,'" which he added, "'most white people can't see the need for.'"[637] More confidently, activist Paul Coe asserted that Sydney's Aboriginal population needed "some sort of civil rights bill to be put through Parliament."[638] Such a law would constitute an important advance, he suggested, because "it could change the attitudes of a lot of people, particularly in government," convincing them that Aboriginals have the same "rights" and privileges" as whites, including "the right to walk the street without victimization, the right to get a job, the right to ensure that government agencies do not arse you around all the time." Moreover, it

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633 See L. Lippman, *Generations of Resistance: The Aboriginal Struggle for Justice* (Sydney and Melbourne: Longman Cheshire, 1981); Markus, Andrew (ed.), *Blood from a Stone: William Cooper and the Australian Aborigines League* (Melbourne: Monash Publications in History, 1986); John Maynard, John, "Fred Maynard and the Australian Aboriginal Association." 21 *Journal of Aboriginal History* (1997) 21.

634 See Faith Bandler, *Faith, Turning the Tide: a personal history of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders* (Canberra: Aboriginal Studies Press, 1989).

635 "Aborigines act to win council and Parlt. Seats," *Sydney Morning Herald*, January 9, 1972, p. 3.

636 "The grassroots protest," *Sydney Morning Herald*, February 12, 1972, p. 7.

637 "Aborigines act to win council and Parlt. Seats," *Sydney Morning Herald*, January 9, 1972, p. 3.

638 1975: 103.

could have "a terrific effect on black identity as a whole," and for the first time turn the law into "a positive weapon" to be wielded for the benefit, rather than the detriment, of Aboriginal people.[639] Nevertheless, by the early 1970s, most indigenous activists were primarily seeking land rights and some degree of political or cultural autonomy.

Within academia, greater attention was also being paid to issues of race.[640] In 1969, physical scientist A. Barrie Pittock delivered a lecture entitled "Towards a Multi-Racial Society" that was subsequently hailed as "a classic statement of racial humanism in the Australian context" and "the most convincing presentation of the liberal position on the question of race tolerance which has been produced in Australia."[641] In the lecture, Pittock expressed regret that thus far South Australia had been the only Australian jurisdiction to legislate against racial discrimination.[642] Academics increasingly publicized the plight of Australia's Aboriginal and Torres Strait Islander populations and explored the terms upon which a more equitable society could be built.[643] They undertook a series of studies of Australian racism in the early 1970s.[644] The legal academy, historically a conservative

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639 Coe 1975: 103. Coe delivered these remarks in 1974, one year before the federal government had enacted the Racial Discrimination Act.

640 For earlier work, see A.P. Elkin, *Citizenship for Aborigines: A National Aboriginal Policy* (Sydney: Australasian Publishing Co., 1944).

641 Barrie A. Pittock, "Toward a Multi-Racial Society" in Frank.S. Stevens (ed.), *Racism: The Australian Experience, A Study of Race Prejudice in Australia, Vol. 3 Colonialism* (Sydney: Australian and New Zealand Book Co., 1972), 240-63.
Frank S. Stevens (ed.), *Racism: The Australian Experience, Vol. II* (Sydney: Australian and New Zealand Book Co., 1972), 9.

642 Pittcok, "Towards a Multi-Racial Society," 243.

643 Colin Tatz (1963, 1966), Ian G. Sharp and Colin Tatz (eds., 1966), Frank Stevens (1968). C.D. Rowley, "The Background to the Cultural Clash" in *We the Australians: What is to follow the Referendum?* (Proceedings of the Inter-Racial Seminar, Townsville, December, 1967), 12-15; C.D. Rowley, *The Remote Aborigines* (Canberra: Australian National University Press, 1971); C.D. Rowley, *Outcasts in White Australia.* Canberra: Australian National University, 1971); Peter Biskup, *Not Slaves Not Citizens: The Aboriginal Problem in Western Australia 1898-1954* (St. Lucia: University of Queensland Press, 1973); R. Chamberlain, *Stuart Affair* (Rigby: Adelaide, 1973); Tatz, Colin and K. McConnochie, eds., *Black Viewpoints: The Aboriginal Experience* (Sydney: Australian and New Zealand Book Co., 1975); Elizabeth M. Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra: Australian National University, 1976).

644 Taft 1970; Gale 1972; McConnochie 1973.

institution in Australia, was slower to respond. In 1966, for example, Enid Campbell and Harry Whitmore, law professors at the University of Sydney and Australian National University, respectively, coauthored a book entitled *Freedom in Australia*.[645] In the book's Preface, they observed that "[l]ittle is known of the actual operation of the laws and principles which secure our freedom."[646] Campbell and Whitmore observed that "[t]here is now common agreement that government and law can and should play a positive and constructive role in the maintenance of the good and free society," thus overcoming objections to "interferences with private 'rights,' such as rights of property."[647] Nevertheless, they dismissed proposals for antidiscrimination laws, believing that such laws "might result ultimately in deeper divisions between aborigines and their neighbors."[648] As an alternative, they suggested that society would get a better return on its investment if money expended on campaigns for constitutional and legal reform was reallocated to practical matters as housing, education and technical training.[649]

During the 1960s and 1970s, the United Nations Association of Australia (UNAA) played an important role in disseminating ideas about race, formulating the problem of racial discrimination, and actively lobbying the Commonwealth and State governments for a legal response to that problem.[650] In 1970, it established a national Committee to Combat Racism and Racial Discrimination (CARRD),[651] and similar committees were subsequently

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645 Sydney: Sydney University Press.

646 Campbell and Whitmore, *Freedom in Australia*, vii.

647 Campbell and Whitmore, *Freedom in Australia*, 2.

648 Campbell and Whitmore, *Freedom in Australia*, xii.

649 Campbell and Whitmore, *Freedom in Australia*, xii.

650 See UNAA (Victoria Division), *Annual Report for the Year 1971-72 and Balance Sheet as at March 31, 1972*, Melbourne, Australia. Available at the National Library of Australia, Canberra, Australia. Author's interview with Burt Coleman, 3 September 2003.

651 UNAA (Victoria Division), *Annual Report and Balance Sheet 1965-66*, Melbourne, Australia, p. 8.

established in every state.[652] Through those committees, the UNAA urged the ratification of the ICERD and the creation of "Race Relations Boards on the lines of the British Boards."[653] Perhaps its most tangible effort was a three-volume study that it sponsored in 1972. Contributors to *Racism: The Australian Experience, A Study of Race Prejudice in Australia* included academics, politicians, religious leaders, and activists.[654] This collective effort was significant due to the paucity of educational and research programs on race relations or Aboriginal studies in Australian schools and universities at the time. Finally, in 1974, in the midst of the parliamentary battle over antidiscrimination legislation, the UNAA convened a conference in Sydney at which it expressed its support both for that legislation and a federal legal aid scheme. These burgeoning societal demands found a receptive audience with the election of the Whitlam government in 1972.

THE PUSH FOR RACIAL DISCRIMINATION LEGISLATION

On 2 December 1972, the ALP won a majority in the House of Representatives and it formed the federal government for the first time in twenty-three years. There was not, however, a simultaneous election for the Senate. In 1972, half of the upper chamber's membership had been elected in 1967 and the other half in 1970.[655] The opposition parties,

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652 In 1971, in conjunction with several Aboriginal organizations, the Victorian Division of the UNAA held what it characterized as "a successful evening" in celebration of International Day for the Elimination of Racial Discrimination, recognized annually on March 21. The event featured Aboriginal speakers who discussed "aspects of 'Discrimination in Aborigine health, Housing and Education.'" UNAA (Victoria Division), *Annual Report for the Year 1971-72 and Balance Sheet as at March 31, 1972*, Melbourne, Australia, p. 9. The *Report* was candid in assessing the relative "success" of its events. For example, on that same page it notes that "[d]espite extensive free publicity and first class speakers, citizens of Melbourne preferred late night shopping to attending Scots Church Hall to hear first class speakers on 'Land Rights for Aborigines: Land Rights for Posterity,'" which it held on 10 December 1971 in commemoration of Human rights Day.

653 See UNAA (Victoria Division), *Annual Report for the Year 1971-72 and Balance Sheet as at March 31, 1972*, Melbourne, Australia, p. 10.

654 Frank S. Stevens (ed.), *Racism: The Australian Experience* (Sydney: Australian and New Zealand Book Co., 1972).

655 Following the 1970 election, the distribution of Senate seats was as follows: Liberal Party, twenty-one seats; Democratic Labor Party, five seats; Independents, three seats; and, the Country Party, five seats.

including the Liberal, National, and Democratic Labor Parties (DLP),[656] held a majority of the Senate's seats. Bitter over their loss of power, they were in a position "to subject most of Labor's legislation to obstruction or to complete defeat when they chose to do so."[657] In May 1974, following a double dissolution of Parliament precipitated by the Senate's rejection of two government bills,[658] the ALP still held only twenty-nine Senate seats to the thirty-one held by non-Labor parties. The final Senate election during the Whitlam government's abbreviated tenure was not held on 13 December 1975, at which time both chambers of Parliament were dissolved following the Governor-General's controversial dismissal of the Whitlam Government.[659] Thus, the ALP never controlled the Senate between 1972 and 1975. As I will show, this had significant consequences for its antidiscrimination legislation agenda.

Upon winning government, Whitlam immediately used international human rights conventions as a means of distinguishing his government from its predecessors. As one of Whitlam's first actions as prime minister,[660] he initiated a review of all international human rights instruments, assessing how and how soon they might be given effect in Australia.[661] Days after his election, Whitlam emphasized the importance his government attached to international human rights instruments, and he pledged to take all necessary steps to prohibit

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656 Formation of the DLP was the result of a split over the issue of communism within the Labor Party, see Robert Murray, *The Split: Australian Labor in the Fifties* (Cheshire: Melbourne, 1970).

657 See Brian McKinlay, *A Century of Struggle: The A.L.P. a centenary history* (Blackburn, Vic.: Collins Dove, 1988). For example, on 10 April 1974, Whitlam secured a double-dissolution because the Senate had rejected various bills during the life of the Parliament.

658 Double dissolutions are provided for in the Australian Constitution at §57.

659 E. Gough Whitlam, *The Truth of the Matter* (Harmondsworth, Mx: Penguin Books, 1979).

660 Gough Whitlam attributes his personal commitment to human rights to the influence of his father, who had served from 1951 through 1954 as Australia's representative to the Commission on Human Rights, during which time the Commission worked to convert the principles recognized in the UN Declaration into the ICCPR and the ICESCR.

661 For example, in December 1973, the government acceded to the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness and the 1967 Protocol relating to the Status of Refugees and in December 1974, it acceded to the 1953 Covenant on the Political Rights of Women.

discrimination on grounds of race. The new government's first weeks coincided with the last weeks of the UNGA conference in Sydney. At Whitlam's instruction, Australia's UN delegation reversed course on an array of international issues—most notably *apartheid*—and Australia's Permanent Representative to the UN signed both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights.[662] As a symbol of the government's break with past policy, in January 1973 the Department of Foreign Affairs launched a new publication, the *Australian Foreign Affairs Record*,[663] and its lead article, "Australia and the United Nations," explained the bold new direction of Australian foreign policy, with its emphasis on human rights. In September 1974, Whitlam addressed the UNGA, an event of great historical importance. He was the first leader of an ALP Government to speak from the UN rostrum and only the second Australian head of government to address the UNGA, the first being Menzies in 1960. In his speech, Whitlam acknowledged Australia's "seriously flawed" record with regard to issues of race and human rights, and he promised to purge all forms of racial discrimination from Australia's shores. According to P.C.J. Curtis, Head of the Public Affairs and Cultural Relations Division of the Department of Foreign Affairs, this "admission" was "the first ever to have been made by an Australian Minister in an international body like the UN." In addition, Whitlam continued to use Parliament as a forum for discussing his government's human rights policies. Early in 1973, he pledged "to press ahead by every constitutional method available," including the external affairs power, "to see that any traces of racism in Australia's legislation and administration are expunged."[664] Significantly, Whitlam made it

662 McKinlay, *A Century of Struggle*, 174.

663 This publication was formerly known as *Current Notes on International Affairs*.

664 House of Representatives, *Hansard*, Vol. 82, 15 March 1973, 606.

clear that his government would use the constitution's external affairs power to override "offensive" state legislation.[665]

In June 1973, the federal government ratified International Labour Organization Convention (ILO) No.111, known as the Convention on Discrimination (Employment and Occupation). Drafted in 1958, this convention proscribed discrimination in employment on grounds of race, color, sex, religion, political opinion, national extraction or social origin. Pursuant to its obligations under this convention, the Whitlam government established a National Committee on Discrimination in Employment and Occupation and a corresponding committee in each of the six states. These committees lacked statutory powers and were intended to serve as an interim measure until antidiscrimination legislation could be enacted. They were comprised of representatives of the Commonwealth and State Governments, as well as of employers' organizations and trade unions, and they investigated complaints and sought to resolve them through consensus and conciliation. Employers' and workers' organizations, vocational guidance and training, placement services, administrative instructions or practices, employment advertisements and superannuation were included in the committees' areas of concern. However, the most that the committees could do in the face of a recalcitrant party was to ask the Attorney-General to table in Parliament a report of the complaint together with the name of the discriminating party.

Attorney-General Lionel Murphy introduced a Human Rights Bill and a Race Discrimination Bill into the Australian Senate in November 1973. The Human Rights Bill 1973 was derived explicitly from the ICCPR and it provided for a right to nondiscrimination. The Bill would apply to the states and create an Australian Human Rights Commissioner, empowered to investigate alleged human rights violations and initiate judicial proceedings. Importantly, the rights listed in the Bill would be enforceable not only against governmental

665 House of Representatives, *Hansard* Vol. 84, 2167, 16 May 1973.

action, but also against *private* action. At the Bill's second reading, Murphy observed that Australia "is commonly regarded as a country where freedom and individuality are allowed to flourish," yet basic democratic rights received "remarkably little legal protection in Australia." He questioned whether a mere "commitment to freedom is the best safeguard against encroachments on that freedom," and he advocated legislation that would provide legal protection of specified rights through judicially enforced remedies. Murphy argued that the Human Rights Bill would "help to make Australian society more free and just."[666] In introducing the Racial Discrimination Bill, Murphy summarized UN efforts to promote the elimination of racial discrimination, beginning with the UDHR in 1948 and down to the Decade for Action to Combat Racism and Racial Discrimination in 1973. He also noted the efforts of the UNAA and the work of Australian scholars Frank Stevens and Elizabeth Eggleston.

Table 5.1: Racial Discrimination Legislative Timeline

Introduced into the Senate	13 November 1973
Reintroduced into the Senate	16 April 1974
Reintroduced into the Senate	31 October 1974
Reintroduced into the Senate	13 February 1975
Sent to the House of Representatives	3 June 1975

Both Bills specified enforcement by Australia's Industrial Court. Besides the High Court, which was provided for in the Australian Constitution, the Industrial Court was the only federal court that existed at the time. The Whitlam government did not trust the state courts to enforce these new laws, and it had not yet been able to create a new system of

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federal courts. Both Bills provided for a transfer of jurisdiction to the new federal superior courts upon their creation. The creation of a federal court system was highly controversial. The Federal Court of Australia was created by the Federal Court of Australia Act in 1976. It began to exercise its jurisdiction on 1 February 1977.

According to Peter Bailey, who was in the prime minister's office the morning after the Bills were introduced, it was clear that their introduction "had evoked a strong and antagonistic response from the States." The prime minister's office was, in Bailey's words, "humming with the reverberations of angry telegrams from almost all the [State] Premiers."[667] As a result, and fearing negative political fallout that might result, Whitlam put the two measures put on hold pending further cabinet discussions.[668] He ultimately decided to abandon the Human Rights Bill 1973, which Murphy had unexpectedly—and much to Whitlam's dismay—introduced into Parliament. Murphy, who had written the ALP's platform on law reform, was committed to advancing human rights issues.[669] In sharp contrast to previous Attorneys-General, Murphy sought to use his portfolio to advance sweeping and radical social change. In this, he was assisted by three activist lawyers, Gareth Evans,[670] Chris Ronalds, and Peter Bailey,[671] who worked in the Department's nascent Human Rights Branch. All three would go on to play important roles in the development of Australia's antidiscrimination law.[672]

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667 Bailey, *Human Rights: Australia in an International Context*, 52; Williams, Human *Rights under the Australian Constitution*, 30.

668 Bailey, *Human Rights: Australia in an International Context*, 52.

669 Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge: Cambridge University Press 1997), 183.

670 In 1978, Gareth Evans was elected to the Senate, where he served until 1996. From 1996 to 1999, he was a Member of Parliament. In addition, he served as Attorney-General from 1983-84.

671 Between 1981 and 1986, Peter Bailey served as Deputy Chairman and full-time chief executive of the Commonwealth's Human Rights Commission. In 1987, he joined the law faculty at the Australian National University, where he teaches courses on Anti-Discrimination Law and Human Rights Law in Australia. He has published two books on antidiscrimination laws, *Human Rights: Australia in an International Context* and Peter Bailey, ed., *Bringing Human Rights to Life* (Sydney: Federation Press, 1993).

672 Within the Attorney-General's Department, Chris Ronalds served as a Legal Officer and Senior Legal Officer from late 1973 through mid-1977. Upon leaving the AG's Department, she became the Legal Officer

The Bills broke new constitutional ground by invoking the external affairs power to legitimate the exercise of federal power in matters affecting the states. In 1973, however, the ICCPR and the ICERD did not enjoy comparable international legitimacy. The former had not yet received the requisite number of signatures to bring it into effect internationally, whereas the ICERD had entered into effect only in January 1969. Because his government's Bills, if enacted, would override contrary state provisions,[673] Whitlam expected a court challenge by the states. He reasoned that if called upon to decide the scope of the Commonwealth's capacity to legislate under the external affairs power, High Court justices would be less likely to strike down legislation that derived from an internationally accepted convention on race for fear of a negative reaction within the international community of jurists.[674] As a result of Whitlam's decision, the Human Rights Bill lapsed with the prorogation of Parliament and was not reintroduced in the new parliamentary session, whereas the Race Discrimination Bill proceeded, albeit on a quite circuitous route. It was reintroduced into the Senate two more times,[675] and each time it lapsed with a prorogation of Parliament. Finally, it was introduced into the House in February 1975 by Kep Enderby,

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of the NSW Anti-Discrimination Board from mid-1977 through late 1982. As a legal adviser and consultant to the Office of the Status of Women, Department of the Prime Minister and Cabinet, she was closely involved in the development of the Sex Discrimination Act 1984, the Policy Discussion Paper (Green Paper) *Affirmative Action for Women* (Canberra: AGPS, 1984) and the development and passage of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986. Ronalds was also the principal author of *National Employment Initiatives for People with Disabilities: a Discussion Paper* (Canberra: AGPS, 1990), the *Report of the National Consultations with People with Disabilities* (Canberra: AGPS, 1991), the *Report on the National Consultations on the Draft Commonwealth Disability Strategy* (Canberra: AGPS, 1994). In addition to numerous articles, Ronalds has published two editions of a book on antidiscrimination law in Australia, Chris Ronalds, *Discrimination Law and Practice* (Sydney: Federation Press, 1998); Chris Ronalds and Rachel Pepper, *Discrimination Law and Practice*, 2nd ed. (Sydney: Federation Press, 2004).

673 The Australian Constitution contains a supremacy clause, see §109.

674 E. Gough Whitlam, *The Whitlam Government 1972-1975* (Ringwood, Vic.: Viking, 1985), 178.

675 A Race Discrimination Bill was reintroduced into the Senate in April 1974, although that Bill was never presented to the Senate for debate. Another was reintroduced in October 1974, but it was withdrawn from the Senate in February 1975. Following the introduction of a Race Discrimination Bill into the House in February 1975, that Bill was transmitted to the Senate on April 15, 1975. Senate debate on that Bill commenced on May 15, 1975. The 1975 Bill was modified in the House before going to the Senate (see Chaney, Senate *Hansard*, May 22, 1975, 1801).

who had assumed the post of Attorney-General following Murphy's controversial appointment to the High Court.

The Racial Discrimination Bill was part of a broader and highly controversial elite-driven shift in Australian policy towards "multiculturalism". As marks of the controversy this stirred, one irate citizen blew a door off Parliament House and another appeared with a knife and threatened to kill Al Grassby, the Minister for Immigration.[676] During Parliament's consideration of the Race Discrimination Bill between 1973 and 1975, a number of reactionary groups, including the Immigration Restriction Council, Family Power: Families United for Australia, and the League of Rights[677] directed their ire against the Bill.[678] In 1972, the League of Rights produced a pamphlet entitled "The Dangerous Myth of Racial Equality," which rationalized the 1960 Sharpeville massacre in South Africa. Other groups argued that antidiscrimination legislation would violate personal privacy by penalizing people who deliberately chose to marry within their race.[679]

In the May 1974 federal election, the ALP lost only a single House seat, that of Riverina, by a margin of only 792 votes. Al Grassby had won Riverina in 1969 with a swing of approximately 20%, a record in Australian federal elections, and he had retained the seat in the December 1972 election that brought the Whitlam Government to power. Grassby's service as Minister for Immigration was a key factor in his stunning loss to Country Party

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676 Al Grassby, *The Morning After* (Canberra: Judicator Publications, 1979), 76-77.

677 The first League of Rights, established in 1946 in South Australia, was born of opposition to a Commonwealth constitutional referendum. Additional branches were subsequently organized in Victoria (1946), Queensland (1949), and Western Australia (1951), and a national organization, the Australian League of Rights was formed in 1960. Eric Dudley Butler was named its National Director. The League directed its ire towards Jews, endorsing the anti-Semitic tract the *Protocols of the Elders of Zion*, but it also targeted Asians and blacks.

678 See Coleman, Senate *Hansard*, May 15, 1975, pp. 1521-22, 1526; Gietzelt, Senate *Hansard*, May 15, 1975, p. 1534; Button, Senate *Hansard*, May 15, 1975, p. 1540.

679 See Button, Senate *Hansard*, May 15, 1975, 1540-41.

candidate, Colonel John W. Sullivan.[680] The Immigration Control Association (ICA), with Robert Clark serving as national president, was the main campaigner against Grassby. Clark's efforts were motivated by his desire to leave his "'children and their children … a happy and racially homogenous country… and not a multi-racial mongrelized hotch-potch of troubled humanity.'"[681] Moreover, according to Jim Warburton, Clark warned that "[t]his may be the last opportunity to engage in 'free speech' on this subject, …, because a Labor victory would mean re-introduction of Senator Murphy's Racial Discrimination Bill."[682] Following Grassby's defeat, Whitlam appointed him to serve as Special Consultant to the Federal Government on Community Relations. It was widely expected that once the Racial Discrimination Bill became law, Grassby would be elevated to the post of Community Relations Commissioner.

Within the Coalition, only a handful of MPs and Senators opposed the Bill on racist grounds.[683] Some, however, argued that Australia did not suffer from racial discrimination.[684] By 1975, when Parliament finally engaged in a full debate on the Racial Discrimination Bill, the Liberal Party was shifting its position on antidiscrimination legislation. In 1974 it changed its platform was to recognize that "'the maintenance of individual freedom calls for positive measures by the Government and private organizations to encourage equal opportunity and to prevent discrimination against the individual or minority groups.'"[685] During the 1975 debates, Liberal Senators Alan Missen and Frederick

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680 Grassby, *The Morning After*; Jim Warburton, "Racism in the Riverina" *South Australian Journal of Social, Political and Cultural Comment* (June, 1974). There were other factors that may have contributed to Grassby's loss. Those included that Grassby had neglected his responsibilities to his electorate, particularly to his farming constituency, on account of ministerial duties that kept him busy and required frequent foreign travel or that his loss was the result of a larger rural swing against Labor.

681 Quoted in Warburton, "Racism in the Riverina," 8.

682 As originally introduced, the Racial Discrimination Bill contained a provision that would have criminalized incitement to racial hatred. It did not survive the Senate.

683 Sheil, Senate, *Hansard*, 1526-27.

684 Greenwood, Senate, *Hansard*, 1515, 1516-17; Wood, Senate, Hansard, 1543; Bunton, Senate, *Hansard*, 1808.

685 Chaney, Senate *Debates*, 1803.

Chaney spoke passionately in support of the Racial Discrimination Bill, but Ian Wood denounced it and castigated his Liberal Party colleagues for displaying "too much weakness, too much jelly in the backbone … to stand up and do what is right."[686] The ALP cheerfully played up these differences. Senator Peter Walsh, for example, suggested that the Liberal Party's "small 'l' Liberals who take a tolerant and progressive view on … racism and other social matters" were hindered by "the Bourbons and dinosaurs within their own Party."[687] The Coalition opposition, thus, walked the fine line of professing its support for racial equality, but denouncing the particulars of the Bill. This led the ALP's James McClelland to observe that although the opposition indicated that it did not oppose the Bill, "it is becoming increasingly obvious that [the opposition] accepts the Bill with great reluctance."[688]

Supporters of the Racial Discrimination Bill made three broad arguments. First, they asserted that racial discrimination needed to be proscribed by law, and further, in contrast to traditional thinking in Australia legal circles, that rights would be better protected if they were codified. Second, supporters praised the conciliatory approach embodied in the Bill, emphasizing that this was the preferred approach in the U.S., Canada, Britain, and New Zealand.[689] And, third, they noted that the Bill provided for educational efforts in conjunction with its enforcement.

The opposition voiced three main arguments against the Bill. First, it feared that the external affairs power was being transformed into an "internal affairs power" that might become plenary in its scope.[690] Second, it doubted that antidiscrimination legislation was capable of changing "human motivations and conduct" and worried that it might actually

686 Senate, Hansard, May 23, 1975, 1793.
687 May 22, 1975, pp.1800-01.
688 Senate, *Hansard*, 1980-81.
689 Murphy, Senate, Hansard, 1977.
690 Greenwood, Senate, *Hansard*, 1515, 1516-17.

exacerbate tensions.[691] Third, it criticized specific aspects of the law's enforcement mechanisms. Most specifically, the Racial Discrimination Bill provided for the creation of a Commissioner for Community Relations who would possess power to compel the production of evidence and pursue court actions in the event that conciliation failed. These powers were likened by members of the opposition to those of the "Star Chamber."[692] In addition, Coalition members asserted that the Bill contained "objectionable intrusions upon individual rights and privacy."[693]

As finally enacted, the Bill was shorn of three key elements due to opposition in the Senate. First, the rules for proving that discrimination occurred were altered. A discriminatory motive had to be proven to be *the* dominant motive for a decision, whereas in the original Bill it was sufficient if a discriminatory motive were one of several different motives, some of which could be non-discriminatory. Further, the original Bill had shifted the burden of proof in civil proceedings pursued so that once it was shown that the defendant committed the alleged act, the burden fell on the defendant to prove that his motive was not racially discriminatory. Even those Liberal senators who supported the legislation as a whole, such as Missen, disapproved of this provision, and it was deleted. Second, as originally drafted the Bill rendered principals liable for unlawful discrimination committed by their agents. This, too, was removed. Third, the powers of the Commissioner for Community Relations were severely circumscribed; he was stripped of any power to bring civil proceedings or to compel participation in conciliation proceedings.

As had been expected, Whitlam named Grassby as the Commissioner for Community Relations after the law was passed. At the launch of this new office, Whitlam

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691 Greenwood, Senate, *Hansard*, 1515, 1516-17; Sheil, Senate, *Hansard*, 1527; Laucke, Senate, Hansard, 1536; Cormack, Senate, *Hansard*, 1795..

692 See Killen, House of Representatives *Hansard*, Vol. 93, 1220. See also Greenwood, Senate, *Hansard*, 1514, 1517.

693 Killen, Qld., LP at House *Hansard*, Vol. 93, 1220.

asserted that the Racial Discrimination Act codified Australia's new identity as "a multicultural nation, in which the linguistic and cultural heritage of the Aboriginal people and of peoples from all parts of the world can find an honoured place." Although he recognized the Act's inadequacies, Whitlam praised it as Australia's first legal articulation of its opposition to all forms of racial discrimination and as "the best guarantee that Australia have ever had that the dark forces of bigotry and prejudice which have prevailed so often in the past will never again be able to exercise influences far greater than their numbers in the community."[694]

A HUMAN RIGHTS COMMISSION

In the election triggered by the Governor-General's dismissal of the Whitlam government in November 1975, the Liberal Party routed the ALP, which lost thirty seats in the House of Representatives. The Liberals won an outright majority for the first time in their history. Twenty-one of the seats lost by the ALP had been held by "Whitlamites" – reformers who had been elected between 1967 and 1974.[695] The 1975 election left both parties with an equal number of Senate seats, twenty-seven each. Despite their House majority, the Liberals decided to form a coalition government with their traditional partner, the National Country Party (NCP, formerly the Country Party). Thus, they could count on the support of the NCP's eight senators. In the wake of the election victory, there were calls within the coalition parties to undo much of what the Whitlam government had done. Although the Fraser government did not rescind the Race Discrimination Act, the Commissioner for Community Relations nonetheless experienced great difficulty in

694 E. Gough Whitlam, *Australia and Asia* (Adelaide: Flinders University of South Australia, 1979), 19.

695 Alan Ramsey, "The Hayden Years: 1976-82" in John Faulkner and Stuart Macintyre (eds.), *True Believers: The Story of the Federal Parliamentary Labor Party* (Crows Nest, NSW: Allen and Unwin, 2001), 122-38.

performing his duties because he was forced to operate with a skeletal staff and limited resources.[696] During 1976 the office was denied funds altogether.[697]

In May 1977 a new center party, the Australian Democrats (ADs), was formed by Don Chipp, a former Liberal minister who had become disillusioned with Fraser's leadership. After the Democrats won two seats in the federal election seven months later, Chipp entered the Senate holding one of those seats. At the next general election, in October 1980, the Democrats won five Senate seats and they gained the balance of power in the Senate. Before that happened, however, the Liberal Party again won an absolute majority of House seats in the December 1977 election. Immediately after that election, the Fraser Government announced its intention to establish a Human Rights Commission that would examine both Commonwealth and, controversially, state laws and practices and report on their consistency with the ICCPR. One Bill for doing this was introduced into the House as early as June 1977 and another was introduced in September 1979.[698] But state leaders refused to endorse any Bill that the proposed commission power to investigate complaints relating to state legislation. Nevertheless, after eighteen months of "painstaking negotiation" with state representatives, the Fraser government ratified the ICCPR in August 1980[699] and it established a Human Rights Bureau within the Attorney-General's Department.[700] This was led by Peter Bailey, who had been working as a special advisor to the Attorney-General's

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696 Thornton, *The Liberal Promise*, 40.

697 See Commissioner for Community Relations, *First Annual Report 1976* (Canberra: Australian Government Publishing Service, 1976).

698 Tahmindjis 1996: 788; R.J. Ellicot, "Address to United Nations Association of Australia Seminar on the proposed Human Rights Commission" (Melbourne, 14 May 1977), press release No. 27A/77, 1.

699 Ratification of the ICCPR was accompanied by nine reservations or declarations on fourteen Articles, which drew heavy fire from the ALP and human rights advocates. See G. Triggs. "Australia's Ratification of the ICCPR: Endorsement or Repudiation?" 31 *International and Comparative Law Quarterly* (1982), 278; D. Rowland, "Australia's Ratification of the ICCPR" 8 *Justice* (1981) 1.

700 Press release of the Attorney-General (5 August 1980). See E. Kamenka and Alice E.S. Tay, "Introduction: Human Rights and the Australian Tradition" in Alice E.S. Tay (ed.), *Teaching Human Rights—an Australian Symposium* (Canberra: Australian Government Printing Service, 1981), 14.

Department since June 1978. The Bureau operated similar to the proposed Commission, but it lacked the power to receive and process complaints, unless they were referred to it by the Attorney-General.

In 1981, the Fraser government successfully steered a watered-down Bill through Parliament that established a Human Rights Commission. The Commission was authorized to examine the consistency of Commonwealth, but *not* state, legislation with the ICCPR and three UN declarations, namely, the Declaration on the Rights of the Child (1959), the Declaration on the Rights of Mentally Retarded Persons (1971), and the Declaration on the Rights of Disabled Persons (1975). In addition, the Commission was authorized to investigate and conciliate complaints of discrimination, though it lacked any enforcement powers. The Office of the Commissioner of Community Relations was integrated into the Commission, whereby the Commissioner, Grassby, lost his independent reporting powers.[701] As with the Racial Discrimination Act, the federal government relied upon the external affairs power to enact the new law. In the estimation of Philip V. Tahmindjis, the Fraser government pursued the Human Rights Commission Act as the result of "political" considerations and "legal necessity," rather than "ideological commitment."[702] As evidence of the Coalition's ambivalence, the Human Rights Commission Act contained a sunset clause whereby the Commission would be terminated on 10 December 1986, unless reauthorized.

Ironically, it fell upon the Fraser government to defend the Racial Discrimination Act of 1975 against a constitutional challenge mounted by the State of Queensland, which claimed that the Commonwealth government lacked the power under the Constitution's

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701 See Racial Discrimination Amendment Act 1981 and the Human Rights Commission Act 1981.

702 Philip V. Tahmindjis, "From symbiosis to synergy? A comparative analysis of the impact of international human rights norms on the legal systems of Canada and Australia" (JSD Dissertation, Dalhousie University, Canada, 1996), 789.

Section 51(xxix) to enact the law. This litigation arose after the Queensland government of Joh Bjelke-Petersen blocked an effort led by John Koowarta, an Aboriginal land rights activist, to buy a Crown lease of a pastoral property in Queensland pursuant to the terms of the federal Aboriginal Land Fund Act 1974. The lease could not be transferred without the state government's approval, but the Bjelke-Petersen government refused to approve the transfer because it believed that the state already had sufficient land reserved for indigenous peoples. Prior to the 1980s, there had been little judicial consideration of the ambit of the external affairs power.[703]

In *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168, the High Court upheld the validity of the Racial Discrimination Act by a majority of four to three. The Court majority—which included Lionel Murphy, the Attorney-General who had introduced the original Racial Discrimination Bills—concluded that the external affairs power could be used by the federal government to legislate international human rights obligations into law and that such laws could be validly enforced against the states. Three of the majority justices, Murphy among them, further concluded that a matter need not have any inherent international character or aspect of international concern in order to qualify it as an "external affair;" rather, it was sufficient that an international body had recognized a matter as such. This construction of the external affairs power was reaffirmed by the High Court in *Commonwealth v. Tasmania* (the Tasmanian Dams Case) (1983), 158 CLR 1, in which the Court indicated that it would defer to the judgment of the executive government in determining whether a matter is of sufficient international concern to warrant use of the external affairs power. These decisions facilitated greater reliance on international human rights instruments in enacting federal antidiscrimination legislation.

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703 The principal cases include *R. v, Burgess ex parte Henry*, 55 CLR 608 (1936); *Airlines of NSW Pty. Ltd. V. NSW* (No. 2), 113 CLR 54 (1965); and *NSW v. Commonwealth (the Seas and Submerged Islands Case)*, 135 CLR 337 (1975).

ANTIDISCRIMINATION LEGISLATION FOR WOMEN

In the late 1970s, three States enacted legislation prohibiting sex discrimination, namely, New South Wales,[704] Victoria,[705] and South Australia.[706] Liberal Senator Bob Ellicott, who had served as Attorney-General in the Fraser government from 1975 to 1977, suggested including a commitment to antidiscrimination legislation for women in the Liberal Party's 1979 federal election platform. Although his suggestion was rejected, over the next year drafting of such legislation was initiated within the Office of the Status of Women. In November 1981, Senator Susan Ryan, a member of the ALP and a founding member of the Women's Electoral Lobby (WEL), preempted these efforts by introducing a Sex Discrimination Bill as a private member's bill. In so doing, Ryan was "the first parliamentarian to place feminist issues on the agenda."[707] Although Ryan's Bill was never brought to the floor for debate, a barrier was broken and the political context was changed. Feminist legal academics began exploring the idea of antidiscrimination legislation in the pages of law reviews.[708] Australia signed the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 17 July 1982. Three months later, Acting Attorney-General, Neil Brown, and the Minister for Home Affairs and the Environment, Tom McVeigh, jointly announced a plan to introduce a Sex Discrimination Bill in Parliament. Their proposed Bill was a limited measure that would have extended protection against discrimination on the ground of sex or marital status to Commonwealth

704 Antidiscrimination Act 1977.

705 Equal Opportunity Act 1977.

706 Sex Discrimination Act 1975.

707 Thornton, *The Liberal Promise*, 30.

708 For example see Chris Ronalds, "Employment Discrimination Committees don't work," (1981) 6 *Legal Service Bulletin* 17; Margaret Thornton, "(Un)equal Pay for Work of Equal Value" (1981) 23 *Journal of Industrial Relations* 466; Margaret Thornton, "Sex Discrimination Legislation in Australia" (1982) 54 *Australian Quarterly* 393; Margaret Thornton, "Anti-Discrimination Remedies" (1983) 9 *Adelaide Law Review* 235; Margaret Thornton, "The Legitimation of Sexual Harassment" (1984) 18 *Scarlet Woman* 2.

employees, and it was not introduced into Parliament before a change of government took place in March 1983.

During the election campaign in late 1982 and early 1983, the ALP promised that it would introduce sex discrimination legislation if elected. Upon winning the election, Senator Ryan was named Minister assisting the Prime Minister on the Status of Women in the new ALP government headed by Bob Hawke. Chris Ronalds, who had worked on the Racial Discrimination Act, served as a legal adviser and consultant to the Office of the Status of Women in the Department of the Prime Minister and Cabinet and was closely involved in the development of the new government Bill. Ryan introduced the fruits of those labors into the Senate on 2 June 1983.[709] The Bill prohibited discrimination on grounds of sex, marital status, and pregnancy in employment,[710] education,[711] the provision of goods, services and accommodation,[712] land,[713] and the implementation of federal laws or programs.[714] In contrast to Ryan's private member's bill in 1981, the 1983 Bill did not provide for affirmative action,[715] and it provided for weaker enforcement mechanisms than her earlier proposal. Several sources of constitutional authority were cited for the Bill, including the external affairs power, the corporations power,[716] and the banking,[717] insurance,[718] and trade and commerce powers.[719] The Bill generated a firestorm of

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709 Sex Discrimination Bill 1983, see Senate, *Hansard*, 2 June, 1185.

710 Sex Discrimination Act, §14.

711 Sex Discrimination Act, §21.

712 Sex Discrimination Act, §§22, 23.

713 Sex Discrimination Act, §24.

714 Sex Discrimination Act, §26.

715 Affirmative action served as the subject of a subsequent legislative effort, which produced the Affirmative Action (Equal Opportunity for Women) Act 1986 and the Equal Employment Opportunity (Commonwealth Authorities) Act 1987.

716 Australian Constitution, §51, xx.

717 Australian Constitution, §51, xiii.

718 Australian Constitution, §51, xiv.

719 Australian Constitution, §51, i.

controversy from businesses opposed to state regulation and from conservative social groups who perceived the measure as a threat to the family.[720]

Table 5.2: Sex Discrimination Act Legislative Timeline

Introduced into the Senate	2 June 1983
Passed by the Senate and transmitted to the House	27 February 1984
Passed by the House	7 March 1984
Entered into Force	1 August 1984

The Sex Discrimination Bill became mired in the Senate for eight months due to a variety of objections from groups on both the left and the right. Gay and lesbian groups unsuccessfully lobbied to have sexual orientation included as a protected ground.[721] As concessions to religious organizations and business interests, the Hawke government ultimately agreed to two main amendments to the Bill. First, religious schools were granted an exemption with regard to employment decisions. As a result, discrimination on grounds of sex, marital status, and pregnancy were made permissible where a school was acting "in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" so long as the selection was made in good faith and in order "to avoid injury to the religious susceptibilities of adherents."[722] Second, a new provision was added tthat set forth an extended list of "occupational qualifications" designed to meet the needs of employers who

720 See Lauchlan Chipman, "To Hell with Equality," *Quadrant* (January, 1985), 44.
721 In 1982, New South Wales added "homosexuality" as a protected ground in its Anti-Discrimination Act.
722 Sex Discrimination Act 1984, §38.

wanted to include sex in the criteria for selecting employees to fill particular kinds of positions.

The Sex Discrimination Act contained several provisions that had been removed from the Racial Discrimination Act. First, it not only allowed complaints of discrimination to be made by an aggrieved individual, it also allowed complaints to be made by other persons, amounting to "representative complaints." Second, whereas the Senate had stripped the Commissioner for Community Relations of the power to obtain documents and other information relevant to the conciliation process, the Human Rights Commission was granted those powers under the terms of the Sex Discrimination Act.[723] Third, the Sex Discrimination Act rendered employers liable for the discriminatory actions of their agents, unless an employer could show that an agent was acting against instructions.[724] A similar measure had been rejected in the Senate in 1975. Finally, a person could be found to have committed unlawful discrimination "whether or not the discrimination is the dominant or substantial reason" for the action.[725] This, too, contrasted with Racial Discrimination Act.

After significant redrafting, the Sex Discrimination Bill passed through both Houses of Parliament less than twelve months after its introduction. It entered into force on 1 August 1984. This was remarkably faster than the two years it took for the Racial Discrimination Bill to become law. Several reasons explain the difference. First, by 1984, the Racial Discrimination Act had been in force for nine years. In that period, only four cases had been brought before the federal courts, and this had curbed fears that antidiscrimination legislation would unleash a wave of vexatious litigation.[726] Second, the

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723 Sex Discrimination Act, §54.

724 Sex Discrimination Act, §106. This provision was successfully invoked in *Boyle v. Isham Ozden & Ors* (1986) EOC 92-165.

725 Sex Discrimination Act, §8.

726 *Koowarta* (1982); *Gerhardy v. Brown* (1983) 49 ALR 169; *Yildez v. Minister for Immigration and Ethnic Affairs* (1982) 46 ALR 112; and *Viskauskas and Another v. Niland* (1983) 47 ALR 32.

High Court's decisions in *Koowarta* and the Tasmanian Dams case had undermined arguments that the external affairs power could not be used as a basis for legislating international human rights obligations into domestic law.[727] Third, the women's movement had been up and running for nearly ten years and was buoyed in its efforts by international developments, such as the International Decade of Women, which had begun in 1975, and the opening for signature of the CEDAW. Indeed, arguments about Australia's international obligations were prominent role among the Act's supporters.[728] Fourth, although the Racial Sex Discrimination Act was highly controversial when it was first enacted, the Coalition parties had succeeded in modifying it to meet some of their objections, and they had become reconciled to the existence of antidiscrimination legislation. At the 1986 election, for example, important Coalition figures—including the current prime minister, John Howard—advocated abolition of the Human Rights Commission, but they did not advocate the repeal of the Racial or Sex Discrimination Acts.

THE DISABILITY DISCRIMINATION ACT

Over the years, numerous reviews of disability policy had been undertaken by Australian governments.[729] In 1983, the Hawke government strengthened the voice of

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727 (1982) 153 CLR 168.

728 See Ryan, Senate, *Hansard*, 2 June 1983, 1185.

729 Report of the Handicapped Programs Review *New Directions* AGPS Canberra 1985; Labour and Disability Workforce Consultancy *National Employment Initiatives for People with Disabilities* AGPS Canberra 1990 (Ronalds report); Senate Standing Committee on Community Affairs Report *Employment of People with Disabilities* Canberra April 1992; KPGM Peat Marwick *Review of the Commonwealth Rehabilitation Service* May 1993; Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* AGPS Canberra 1993; Privacy Commissioner and the Victorian Office of the Public Advocate *Private Lives: An initial investigation of privacy and disability issues* August 1993; Privacy Commissioner and the Victorian Office of the Public Advocate *Private Lives: An initial investigation of privacy and disability issues* August 1993; Privacy Commissioner and the Victorian Office of the Public Advocate *Private Lives: An initial investigation of privacy and disability issues* August 1993; MGM Consultants in Human Services *Advancing Advocacy* Disability Advocacy Effectiveness Project September 1995; Australian Institute of Health and Welfare *The demand for disability support services in Australia* AGPS Canberra 1996; Anna Yeatman *Getting Real* The Interim Report of the

people with disabilities by establishing the Disability Advisory Council to provide direct advice to the federal government. During the 1980s, an array of disability rights groups formed, including the Disabled Peoples' International (Australia) Ltd. (DPIA), and people with disabilities took control of existing groups that had historically spoken for them. The media also started to take greater notice of disability rights issues and disabled people increasingly confronted MPs by visiting their offices and protesting outside Parliament. In 1988, the Australian Bureau of Statistics conducted a Survey on Disability and Ageing and found that approximately 2.5 million Australians were "disabled" to some extent.[730]

The Disability Discrimination Act of 1992 was the product of lobbying by disability rights groups and bureaucratic insiders. Two government bodies played especially important roles in translating group demands into government law. These were the Disability Advisory Council of Australia, chaired by Graeme Innes, and the Disability Anti-Discrimination Legislation Committee, chaired by Chris Ronalds, who had played a key role in the development of the racial and sex discrimination acts. Ronalds also served as principal author of the *National Employment Initiatives for People with Disabilities: a Discussion Paper*,[731] which was released in August 1990, and the *Report of the National Consultations with People with Disabilities*, which was released in 1991.[732] Both reports were instrumental in placing antidiscrimination legislation for the disabled directly onto the government agenda and shaping the contours of public debate. In 1994, after the Disability Discrimination Act became law, Ronalds conducted consultations and compiled a *Report on the National*

Review of the CSDA AGPS January 1996; and, Australian Law Reform Commission, *Making Rights Count: Services for people with a disability* (Canberra: Government Printer, 1996).

730 Australian Bureau of Statistics, *Survey on Disability and Ageing* (Canberra: Government Printing Service, 1988).

731 (Canberra: Australia Government Printing Service, 1990).

732 (Canberra; Australia Government Printing Service, 1991).

Consultations on the Draft Commonwealth Disability Strategy,[733] which has since served as a foundational document in implementing federal policy toward the disabled.

By 1992, five states and the Australian Capital Territory had laws prohibiting disability discrimination, and such legislation was proposed for Tasmania, the sixth state, and for the Northern Territory. In introducing the federal government's Disability Discrimination Bill before a gallery filled with members of the Disability Advisory Council of Australia, MP Brian Howe described the Labor Party's "vision is a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights." It was "essential," in his opinion that there be "a legislative basis to enable people with disabilities to participate in the economic, social and political spheres of the community and subsequently to determine the direction of their own lives."[734] Throughout the debate, numerous MPS and senators acknowledged that discrimination against people with disabilities is a matter of international concern and they referenced the United Nations Decade of Disabled Persons and Australia's international obligations.

The Liberal-National Party opposition did not oppose the Bill, but it worried about the implementation costs. The opposition negotiated several exemptions, including exemptions for the defense forces, individuals with infectious diseases, and a temporary exemption for the telecommunication industry.[735] In the Senate, the Australian Democrats supported the Bill, although they opposed these exemptions as well as provisions that omitted matters of Social Security and Immigration from the Bill's jurisdiction.

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733 (Canberra: Australia Government Printing Service, 1994).

734 House, *Hansard* 26 May 1992, 2750.

735 See House, *Hansard*, 19 August 1992, 221.

As enacted, the Disability Discrimination Act covered all of the same areas as the other federal antidiscrimination laws.[736] Along with the specific exemptions negotiated by the Coalition parties, the Act includes two general exceptions: unjustifiable hardship and the inherent requirements of the job. Once a complainant shows that he or she has been subjected to unlawful discrimination, the respondent claiming one of these exemptions bears an evidentiary burden. The post of Disability Discrimination Commissioner was established and assigned responsibility for investigating and conciliating complaints of disability discrimination. The Disability Discrimination Act empowers the Commissioner either to dismiss complaints found to be unsubstantiated or to attempt to reach a settlement of the complaint. The aim of the legislation is to promote resolution through conciliation wherever possible. However, where the Commissioner is unable to resolve a complaint by conciliation, he or she may refer the matter to the Human Rights and Equal Opportunity Commission (HREOC),[737] which can then consider the complaint and issue a non-binding determination. Parties wishing to enforce that determination are required to apply to the Federal Court, which will rehear the matter and make a legally binding judgment.

CONCLUSION

Relative to other Anglo-American countries, Australia was a late developer in terms of antidiscrimination legislation. The postwar dominance of conservative political interests kept that legislation off of the governmental agenda. The ALP's skillful use of international human rights and domestic issues fueled the country's first antidiscrimination law, the Racial Discrimination Act, but a hostile Senate ensured that the law would be marginalized within

736 These include work, accommodation, education, access to premises, the provision of goods, facilities, services and land; existing laws; and the administration of Commonwealth laws and programs.

737 The HREOC was created in 1986 upon the expiration of the sunset provision in the Human Rights Commission Bill.

the political system. Subsequent groups would gain access to the federal antidiscrimination regime, but at no point were the enforcement institutions empowered to represent complainants before the courts.

Conclusion

During the second half of the twentieth century, governments in the Anglo-American countries were increasingly implored and inclined not only to end their own discriminatory laws and policies, but also to act against racially discriminatory societal practices. Societal discrimination could not, however, be eliminated simply by implementing nondiscriminatory state policies and actions, although such reforms were important. Rather, in order to combat societal discrimination states had to reassert their authority over the private sphere and renegotiate an existing set of common law property and contract rights. American sociologists and social psychologists, based mainly in New York, propagated a set of ideas about human nature, the capacity of law to reshape human behavior, and the requisites of democracy. These ideas were embraced by newly established UN and other international bodies in the wake of World War II and then disseminated around the world. An array of UN and ILO declarations and conventions embodied these ideas and pushed them onto the policy agendas of several countries, including New Zealand and Australia. As I have shown, however, the ideology of antidiscrimination and the project of erecting antidiscrimination regimes had little effect until national political elites deemed them to be political necessities.

In the decades after World War II, when the U.S., Canada, and Britain were experimenting with antidiscrimination laws, no such laws were pursued in the antipodean parliaments. This disparity was the result of two main circumstances. First, in New Zealand and Australia potential constituencies for the ideology of antidiscrimination were small. Second, there were few political opportunities for those who did subscribe to this ideology to act. In the early 1960s, however, a new generation of social scientists in the antipodean countries began to replicate the research that American social scientists had pioneered during

and after the war. On the other hand, the small and conservative legal academies in New Zealand and Australia resisted the ideology of antidiscrimination. New Zealand, with its unitary political system, provided no laboratories for antidiscrimination policy experimentation at the level of constituent states. The Department of Maori Affairs was able to keep antidiscrimination legislation off the government's agenda for more than ten years. Australia's six states could have served as legal innovators, but conservative forces dominated them for most of the postwar period. The Australian Labor Party won government in South Australia in the early 1960s, and under the leadership of its reformist Attorney-General, Don Dunstan, it enacted the country's first antidiscrimination law in 1966. However, no other states enacted comparable laws until New South Wales did so over ten years later. At the federal level, Sir Robert Menzies' successive Liberal and Country Party coalition governments successfully stifled proposals within the federal bureaucracy to implement antidiscrimination policies mandated by the UN and by several international treaties and covenants.

Australia's debates over antidiscrimination legislation were more acrimonious and contentious than those in New Zealand. Three reasons explain the difference. First, in New Zealand, the conservative National Party introduced all of the country's main antidiscrimination laws. The Labour Party, which still had strong socialist inclinations, was not likely to oppose those laws on grounds that they infringed property and contract rights, which some National Party and many business opponents of the laws insisted were principled objections to the laws' passage. In the late 1970s, the Labour Party's ties to organized labor prevented it from aggressively pursuing antidiscrimination legislation for women, but the ties were not strong enough to induce Labour to oppose the Nationals' legislation altogether. By 1977, when the Human Rights Commission Act was being considered, women' rights had been construed as human rights in a bevy of international

declarations and conventions. Domestically, moreover, New Zealand's women's movement had developed an organizational base, through groups like the Women's Electoral Lobby, put heavy pressure on the Wellington government to act.

Second, from an institutional perspective New Zealand's unicameral parliament, over which a single party presided by virtue of controlling a majority of seats, offer the Labour Party no real means of contesting or shaping the National Party's legislative proposals. Until 1966, New Zealand elected its parliament according to a first-past-the-post system.[738] This, combined with a lack of other institutional restraints, afforded the cabinet and governing party with what Geoffrey Palmer has described as "unbridled power."[739] By contrast, the Australian Senate, in which non-Labor parties controlled the balance of power between 1972 and 1975, gave opponents a powerful platform from which to contest the antidiscrimination bills that Labor's two Whitlam governments introduced into the federal Parliament. Because all bills needed the assent of both houses of Parliament, senators were able to strip the Racial Discrimination Bill of its most innovative features, including giving the Commissioner for Community Relations access to the courts.

Third, in Australia consideration of antidiscrimination legislation coincided with broader policy and ideological shifts. The Racial Discrimination Bills, for example, were debated in the context of important changes in the country's immigration policy. During the late 1960s and early 1970s, both Coalition and Labor Party governments worked to dismantle the White Australia policy against strong opposition by various groups in the

738 Following a 1993 referendum, New Zealand adopted a mixed-member-proportional (MMP) representation electoral system. The first election under that new system was held in 1996. See Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government*, 4th ed. (New York: Oxford University Press, 2004).

739 Geoffrey Palmer, *Unbridled power? An interpretation of New Zealand's constitution and government* (New York: Oxford University Press, 1979); Geoffrey Palmer, *Unbridled power: An interpretation of New Zealand's constitution and government*, 2nd ed. (Auckland: Oxford University Press, 1987).

community.[740] There was, in effect, a political elite consensus that racially discriminatory immigration laws were doing injury to Australia's international standing. This paved the way for the Labor Party to portray the Racial Discrimination Act as part of its larger effort to remake Australia's national image as a cosmopolitan nation in Asia. Historically, New Zealand had also maintained a racially discriminatory immigration policy, and it did not liberalize that policy until the 1980s.[741] Consequently, debates over New Zealand's national image were not coupled to the discussion of domestic antidiscrimination laws, and this made the latter's acceptance and passage all the more difficult.

By 1984, when the Australian Parliament was finally considering legislation prohibiting sex discrimination, conservative groups were vehement in their opposition to such legislation on behalf of women. But here again, the Australian debate was cast in broad terms about the appropriate role of women in society and the stability of the family unit. In somewhat parallel fashion, it was not until New Zealand considered homosexuality as a protected ground that it engaged with the issue of antidiscrimination laws pertaining to women.

Despite these political differences, both Australia and New Zealand constructed antidiscrimination regimes that were comparatively conservative, especially as regards the terms of their enforcement structures. Neither country has created an enforcement structure that fosters litigation, preferring instead to mediate or conciliate most complaints of discrimination. New Zealand has, however, empowered a state official to represent complainants before the courts, whereas Australia has only given its enforcement agencies the power to intervene in particular kinds of cases or to file *amicus curiae* briefs. Neither

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740 See Katharine Betts, *Ideology and immigration: Australia 1976 to 1987* (Carlton, Vic.: Melbourne University Press, 1988); and Katharine Betts, *The great divide: immigration politics in Australia* (Sydney: Duffy and Snellgrove, 1999).

741 See the Immigration Act of 1987; see also Patrick Ongley and David Pearson, "Post-1945 international migration: New Zealand, Australia and Canada compared" 29 *International Migration Review* (Fall 1995), 765-294.

antipodean country yet has an antidiscrimination regime that approaches the American regime's active role for the state accompanied by tough enforcement institutions.[742]

[742] See Landsberg, *Enforcing Civil Rights*.

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